

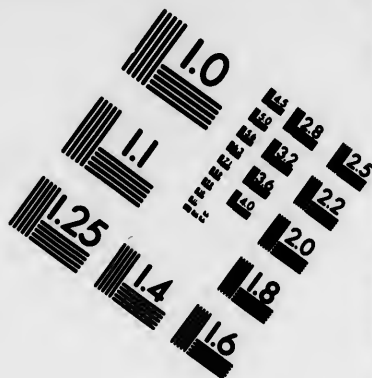
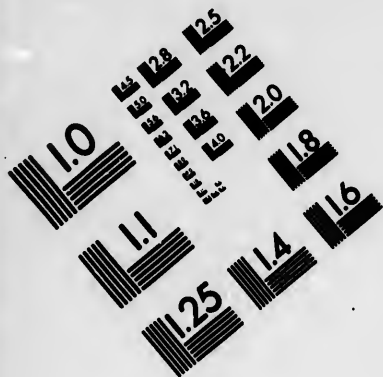
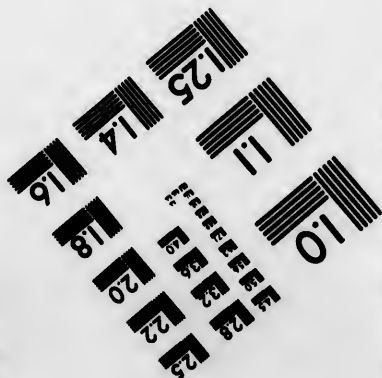
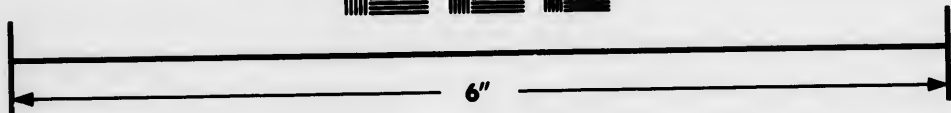
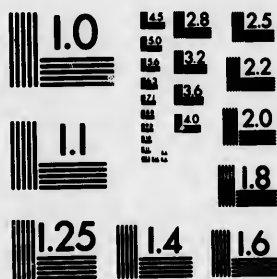


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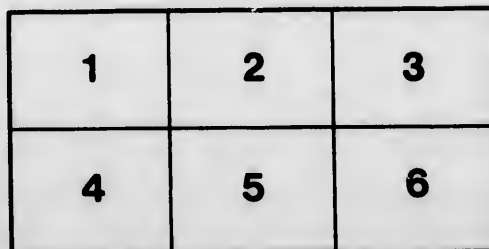
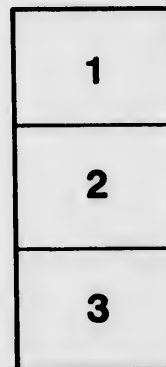
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AMERICAN CRIMINAL REPORTS.

CROW V. STATE.

(96 Ga. 297.)

ABANDONMENT: *Abandonment of Child by Father — What Constitutes.*

1. Abandonment, dependency, and destitution are each equally essential to the commission of the offense under the Georgia statute, and its requirements are not met, in a prosecution thereunder, by showing an abandonment by the father of his minor child, and its dependence upon another, but it must also be shown that the child was left in a destitute condition.
2. Where, under an indictment for such an offense, the evidence shows that the father, before the birth of a child, abandoned its mother; that she thereafter lived with her father, who voluntarily supported her; that the father of the child, upon request of the mother, made, from time to time, suitable provision for its support, and never at any time refused to make adequate provision therefor, a verdict of guilty is unwarranted by the evidence, and a new trial should be awarded.

Error from Superior Court, Cobb County; Hon. G. F. Gober, Judge.

Anthony Crow was convicted, under Code, § 4373, for abandoning his child, and brings error. Reversed.

Section 4373 provides, that if any father shall wilfully abandon his child or children, leaving them in a destitute condition, such father shall be guilty of a misdemeanor.

A. N. Edwards, T. B. Irwin, and D. P. Lester, for plaintiff in error.

Geo. R. Brown, Solicitor General, for the State.

ATKINSON, J. To the principle stated in the first head-note, it is only necessary to cite the language of the statute from which section 4373 of the Code is taken; and to the point that the words "dependent" and "destitute," as employed in that statute, were not designed to be used as synonyms, it is only necessary to refer to the language employed by Chief Justice Jackson in 78 Ga. 188, in the case of *McDaniel, governor, v. Campbell*, which we quote, as follows: "So, to leave a child dependent does not convey the idea of absolute destitution. The child may be cared for and comfortable, and yet dependent on some charity; but, left destitute, it has no protector, friend, or other author of benevolent kindness, feeding and clothing it." In that case the indictment failed to allege that the child had been left in a destitute condition. The Chief Justice further says: "It would seem that the strength of the crime, as defined in the statute, is emasculated of much sinew and muscle by the indictment, and the crime is not substantially charged." In the present case the allegations in the indictment are technically accurate, but the evidence wholly fails to sustain the proposition that the child was left in a destitute condition. According to the testimony of the mother, who was the principal witness in the case, the father made ample provision for the support of the child suitable to its condition in life. Of his means he provided according to his ability, and she testified that he had never failed to respond when advised of the necessities of his offspring. Many cases occur in human experience where a child is less destitute under the tender care of affectionate grandparents than when its wants are left to be supplied by an improvident and shiftless parent.

At all events, neither abandonment nor destitution is proven unless the father leaves the child, intending to abandon it to its own fate, without providing for it the necessities of life, and leaving it wholly dependent upon others who are themselves unable or unwilling to provide for it.

Let the judgment of the court below be reversed.

NOTE.—Offer to support children on wife surrendering them, no defense. —Defendant's offer to support the children on their surrender to his custody by the wife, does not relieve him from liability for their support, even if they are improperly detained from him by the wife, since he can obtain custody of them, if entitled to it, by appropriate legal proceedings. *State v. Sutcliffe*, 18 R. I. 53.

Divorce suit no defense.—On prosecution of one for unreasonably neglecting to provide for support of his wife and minor children, a decision in a divorce suit by such person, denying his wife's motion for alimony pendente lite is not admissible, not only because such decision is not determinative of the question involved on the prosecution, but because the parties to the suits are different.

STATE v. BOBBST.

(131 Mo. 328.)

ABDUCTION: *For purposes of concubinage—Harmless error—Instruction—Trial—Remarks of counsel.*

1. In a prosecution for taking away from her father a female under the age of eighteen, for the purpose of concubinage, it is not reversible error to admit evidence that the father sent the girl money with which to return home.
2. Under Rev. St. 1893, § 3484, providing for the punishment of "any person who shall take away any female under the age of eighteen, from her father, * * * for the purposes * * * of concubinage," defendant may be convicted, though the female was previously unchaste.
3. An instruction defining concubinage as "cohabitation" "without being lawfully married," is not erroneous as authorizing a conviction for a single sexual act, or for a night.
4. Consent on the part of the female is no defense to such a prosecution.
5. It is not necessary that the taking away should have been accompanied by sexual intercourse; the offense is complete when the taking away was for that purpose.
6. Testimony of prosecutrix that she thought she would return home from a certain point on the route taken by defendant and herself, when she left home, does not conclusively show that defendant did not intend to cohabit with her for any length of time, so as to prevent a conviction.
7. In a prosecution for abduction of a female for the purpose of concubinage, a reference of the prosecutor in his argument to defendant as "this infamous, lecherous scoundrel" which passed unrebuked by the court on defendant's objection thereto, is ground for reversal.

Appeal from Circuit Court, Audrain County; Hon. E. M. Hughes, Judge.

Michael Bobbst was convicted under Rev. St. 1889, § 3484, which provides that "every person who shall take any female under the age of eighteen years from her father, mother, guardian or other person having the legal charge of her per-

son, either for the purpose of prostitution or concubinage * * * shall, upon conviction thereof, be punished by imprisonment in the penitentiary not exceeding five years," and appeals. Reversed.

Edmonston & Cullen, for appellant.

R. F. Walker, Attorney-General, and *Morton Jourdan*, Assistant Attorney-General, for the State.

GANTT, P. J. The defendant was indicted at the April term, 1893, of the circuit court of Montgomery county. There are two counts in the indictment. In the first he was charged with taking Martha B. Butler, a female child under the age of eighteen years, from the custody of her father, for the purpose of prostitution. In the second count, he is charged with having taken her, on October 12, 1892, from the custody of her father, for the purpose of concubinage and cohabitation with him as man and wife without authority of law, and without legal marriage, against the peace and dignity of the state. He was acquitted on the first count, and convicted on the second. He obtained various continuances and a change of venue to Audrain county. The trial was had at the September adjourned term, 1894. No reason appears why this transcript was not filed in this court until July 12, 1895.

The attention of the various circuit and criminal courts is hereby called to the wholly inexcusable delays that are constantly occurring by reason of the failure to certify these cases promptly to this court, with the hope that they will see to it that appeals are promptly certified.

The record substantially shows that Martha B. Butler was born on the 19th day of November, 1875, and during September and October, 1892, and at all times prior thereto, she resided with her father, Isaac Butler, and mother, in Montgomery county, Mo.; that she had a sister by the name of Mrs. Switzer living about a mile from the home of her father; that during September her father allowed her to go to the house of her sister temporarily to assist her in cooking for some harvest hands; that while at the home of her sister the defendant persuaded and induced her to leave the residence of her sister, and to accompany him, defendant taking with him a wagon and buggy; that they started together, and drove from

the home of the sister, first to Wellsville, Mo., then to Mexico, Boonville, and from there to Guthrie, Okl. It is shown by the testimony that at Mexico they were joined by another female, a Miss Outenwreath; that the defendant cohabited and had intercourse with Miss Butler at divers points along the road from Montgomery county to Oklahoma; that in Oklahoma, where she remained some months, and until her father sent her money on which to return home, they lived and cohabited together.

The defenses offered in this case are the bad reputation for the prosecutrix, and that when they reached Wellsville, Mo., en route to Oklahoma, the defendant urged and insisted that the prosecutrix return home.

It is very evident that prior to this time her ruin had been accomplished. It is also in evidence that the father of the prosecutrix made every effort possible to ascertain the whereabouts of his daughter, in order that he might compel her to return home, and that as soon as he learned of her whereabouts he sent her money on which to return. It is fairly established by the testimony that, at the time of the abduction the prosecutrix was under the age of eighteen years though an attempt was made by the defendant to show by one or two of the neighbors that she was over the age of eighteen years at the time of the abduction.

Various errors are assigned for a reversal of the judgment. There are twenty-one distinct grounds for a new trial set out in the motion, and twelve in the motion in arrest. Counsel who drew the motion in arrest seems to have confused the prosecution with some civil case, as we find, among other reasons for arresting the judgment, the following: "(3.) The petition does not state facts sufficient to constitute a cause of action herein." "(5.) That the answer does not state facts sufficient to constitute a defense to plaintiff's cause of action." Many of the other grounds are utterly meaningless as applied to this case. We shall consider those now urged in the brief.

1. There is no merit whatever in the point that the court had no jurisdiction because no indictment had been preferred. The record amply shows the circuit court of Montgomery county convened and was organized as required by the law, the impaneling of the grand jury, and the return of the indictment signed by the prosecuting attorney, and duly indorsed by the foreman of the grand jury, F. M. Hayden, with the

clerk's indorsement of filing thereon of April 25, 1893. *State v. Lord*, 118 Mo. 1.

2. There was no reversible error in permitting the father of the prosecutrix to testify that he sent his daughter, the prosecutrix, \$16 to enable her to return home from Oklahoma. Defendant and his wife both testified the girl went with them to Oklahoma, and while we can not see how it was material to the issue, we can not see how it was prejudicial. It seems to us wholly immaterial but not hurtful to defendant and he evidently took the same view, as he did not object to it.

3. Defendant assigns as error the refusal of the trial court to permit defendant to prove by various witnesses specific acts of unchastity. The court admitted evidence tending to show that her general reputation for chastity and virtue was bad but refused the evidence of individual acts of this character and indicated its view of the law by the following instruction: "The court instructs the jury that the fact whether the prosecuting witness, Martha B. Butler, was a virtuous girl or not at and prior to the time of her alleged taking away by defendant, or since, is not involved in this case and should not be considered by the jury in determining the defendant's guilt as charged, but if the jury believe from the evidence that her general reputation for chastity and virtue in the neighborhood in which she lived is bad, that fact may be considered by the jury in determining the credit to be attached to her testimony as a witness."

The ruling of the learned circuit court is in accord with the decision of this court in *State v. Johnson*, 115 Mo. 480. In that case this court, through Judge Burgess, said: "We think, as was said in the case of *The People v. Demousset*, (12 Pac. 788, by the supreme court of California), that the statute was intended to protect the chaste as well as to reclaim the unchaste."

So long as this girl was under the protection of her father, the law threw its protection over her. Its purpose was to protect parents and guardians in their custody and care of minor females, without regard to their chastity, and their families from sorrow and disgrace. The legislature might have required the girl to be chaste but it did not, and as against one who inveigles the daughter or ward from the roof of her father or guardian to lead with him a life of prostitution or illegal

concubinage we neither have the right nor inclination to interpolate one word that would detract from its effectiveness.

It will be observed that, unlike the somewhat kindred statute for the punishment of seduction it does not require the female to be of good repute, and in this respect materially differs from the statutes of Iowa and New York on this subject.

As this case must be reversed for another cause, we suggest that the structure of the instruction is unfortunate. Instead of saying the fact whether she was virtuous or not was not involved in the case and was not to be considered, we think it better to have instructed the jury that although they might believe from the evidence that the general reputation of Martha B. Butler for chastity and virtue was bad, her want of chastity constituted no justification to any one to take her from her father's custody for the purpose of prostitution or concubinage, but should be considered by the jury in weighing her testimony, and was admitted for that purpose only.

4. The third instruction is not open to the objection that it improperly defines concubinage or permits the defendant to be convicted for a single sexual act, or for a night. On the contrary, it expressly requires "a cohabiting" "without being lawfully married," which phrase, "*ex vi termini*," imports a living or dwelling together.

5. There was no error in overruling the demurrer to the evidence. That defendant took the girl from her home and kept her with him in his journey to Oklahoma is uncontroverted, and that she was ignorant of his alleged marriage to Miss Outenwreath until she reached Mexico. In the meantime, to use her own words, "she had been ruined;" and when he told her she could go home she preferred going with him to hide her shame.

It was not necessary that the taking away should have been accompanied by sexual intercourse. The offense was complete when he took her for that purpose. His subsequent conduct in continuing that intercourse, though claiming to be married, was evidence of his original purpose. Her willingness to go on with him, when he reached Wellsville and Mexico is no palliation whatever of his offense. Her consent constitutes no defense. *State v. Gibson*, 111 Mo. 92; *State v. Round*, 82 Mo. 679; *State v. Johnson*, 115 Mo. 480; *State v. Stone*, 106 Mo. 1.

It is insisted because the prosecutrix said she thought she would go back from Wellsville, that this conclusively shows the defendant did not intend to cohabit with her for any length of time. We do not think it follows at all. This was evidence of her intention, not his. The jury might well have found that she was induced to go that far with him by persuasion. Certain it is, she testifies he promised to marry her if she would go on to Mexico. There is no explanation why this young girl should be traveling, in the night, from her home, with this man alone. She had not been engaged by him as a servant with her father's consent; she was not a relative of his; and her testimony, ignorant as she and her family all seem to be, indicates she had been induced to go with defendant, and maintain this unlawful relation with him, and that it continued for several months.

6. In the closing argument to the jury, the prosecuting attorney turned to the prisoner at the bar of the court, and denounced him as "this infamous, lecherous scoundrel." The counsel for defendant protested, but the court declined to rebuke the prosecuting attorney, and defendant excepted. We can not too strongly express our disapproval of such language and such conduct in one charged with the important duty of representing the state in a public prosecution. Counsel have no right to indulge in such abuse of a prisoner. Such language should have been instantly rebuked by the court. It was a serious contempt to the dignity of the court, and an altogether unwarranted assault upon the prisoner. Again and again we have reversed causes for such conduct, and must and will continue to do so until the prosecuting attorneys understand that no man, however guilty, can be punished in this state with our approval, until he has had a fair and impartial trial. The judgment is reversed and cause remanded for this misconduct. *State v. Jackson*, 95 Mo. 623; *State v. Ulrich*, 110 Mo. 350; *State v. Fischer*, 124 Mo. 460.

7. If the case shall be again tried the instruction on reasonable doubt should be made to conform to the formula approved by this court in *State v. Nueslein*, 25 Mo. 111, and ever since adhered to.

The judgment is reversed and cause remanded.

SHERWOOD and BURGESS, JJ., concur.

NOTE.—*What constitutes offense.*—Abduction, or taking away of a man's wife, was accomplished by fraud, persuasion, or open violence, though the law in both cases supposes force and constraint, the wife not having legal capacity to consent. The husband had an action for damages for the abduction of his wife, and by Statute Westm. 1, 3 Edw. I, c. 13, the offender was to be imprisoned two years and be fined at the pleasure of the King. 3 Black. Com. 139. The action in behalf of a father for the abduction of a child, a guardian of a ward, and the like, seems to have been confined at common law to the recovery of civil damages. The decision in the principal case is based upon broad principles of morality, and is supported by abundant authority. So long as the girl was under her parents roof she was entitled to the protection of the law. Legislation in every State of the Union ought to be ample to protect parents and guardians in their custody and care of minors without regard to the question of previous chastity.

STATE V. FISKE.

(66 Vt. 434.)

ABORTION: *Notice where advice could be obtained.*

An indictment charged defendant with making public, by print and writing, words and language that gave information where advice might be obtained for the purpose of procuring the miscarriage of a pregnant woman. *Held*, insufficient, as it did not allege the manner in which the print and writing were made public. Ross, C. J., dissenting.

Exceptions from Washington County Court; Rowell, Judge.

Ira H. Fiske was indicted for publishing information for causing the miscarriage of a pregnant woman. A demurrer to the indictment having been overruled, he excepts. Exceptions sustained.

The substantial part of the first count alleged that the respondent

"feloniously and knowingly did cause to be made public, by print and writing, words and language that gave notice and information where advice and information and medicine and direction might be obtained for the purpose of causing and procuring the miscarriage of a pregnant woman; which print and writing is of the tenor following, that is to say :

"ARTHUR C. BELL, Esq.,

"A young girl by the name of Coburn has applied to me to help her out of a baby case. She says it is yours. Her mother wants to see you at once, but I have their promise that if I will help her she will keep quiet forever.

"Now, I will take her to my house, get her out of the scrape, if you will send me \$100—fifty to give the girl, fifty for myself. She is poor, and needs help. Now, she can swear this onto you, and you can not escape it. I do not like the law, yet it is true.

"I will stand between you and all harm. If you fear to trust me, come down and see me. I am with Dr. Lance and he says tell you that you can trust our word. She will wait till I hear from you. If no reply comes, she will send a lawyer to see your mother. This will force you to marry her or leave the state, and you can not escape it. But we will help you out, slick and clean, for \$100, as we say, and you will never hear a lisp. I can help her out and have her well in two weeks.

"The girl is poor and can pay us nothing, and we work for pay, but you can trust implicitly in what I tell you. My partner, Dr. Lance, will swear to this. Dr. I. H. Fiske, 15 Winter St. Montpelier, Vt.

"Dr. Fiske tells you the truth, and will do all he tells you he will. He is keeping them still till you write us. J. D. Lance, M. D.

"P. S. Come down and see us in the night. Come to my house, 15 Winter street. No one will see you. Ans. at once. Montpelier. I. H. F.'

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state."

The second count was like the first except the allegation was that the respondent "did publish and circulate and cause to be published and circulated," etc.

Zed M. Stanton, State's Attorney, and *John H. Senter*, for the State.

Dillingham, Huse & Howland, *Geo. W. Wing*, and *H. W. Kemp*, for respondent.

TAFT, J. This indictment is in two counts—the first, charging the respondent with making public by print and writing, words and language that gave notice and information where advice might be obtained for the purpose of procuring the mismarriage of a pregnant woman; the second, that he did publish and circulate, and cause to be published

and circulated, a certain writing containing words and language of the same tenor as stated in the first count. The print and writing are set forth in each count. The respondent under a general demurrer contends that the indictment is insufficient. The prosecution insists that, as the offense is purely statutory, it is sufficient to charge it in the words of the act, as is done in the form given in Heard's Criminal Law (page 351), of an indictment under a statute substantially like ours. Ordinarily it is sufficient to charge a statutory offense in the words of the act. But if, from the nature of the offense the words of the statute do not clearly and definitely apprise the defendant of the offense charged against him, greater particularity must be used. Thus, in obtaining goods under false pretenses, the false pretenses must be alleged. *State v. Keach*, 40 Vt. 113. So in case of false statements of the distance a horse was driven, the false statements must be set forth. *State v. Jackson*, 39 Conn. 229. In case of conspiracy it is necessary to set forth the acts specifically and show the means by which the fraud was to be compassed. *Lambert v. People*, 6 Cow. (N. Y.) 578. Indictments for voting "not having the legal qualifications of a voter," have been held insufficient for not specifying what qualifications the voter lacked, in *Quinn v. State*, 35 Ind. 485; *State v. Bruce*, 5 Or. 68; *State v. Moore*, 3 Dutch. (N. J.) 105. A complaint substantially in the words of the statute for wilfully injuring a public building, held insufficient, in failing to allege the particular manner of the injury. *Sixte v. Costello* (Conn.), 25 Atl. 477. One under a statute forbidding the publication of obscene literature held defective for not alleging the manner of publishing. *State v. Smith*, 17 R. I. 371. Notwithstanding the rule that it is generally sufficient to charge a statutory offense in the words of the statute, it is fundamental in the law of criminal procedure that the accused must be apprised by the indictment, with reasonable certainty, of the acts with which he stands charged, and all facts necessary to constitute the crime must be fully and distinctly set forth, so as to inform the respondent with what he stands charged, that the court may see a definite offense on the record to which it may apply the penalty prescribed by law, and the accused enabled to plead a conviction or acquittal in bar of a subsequent prosecution for the same offense. The Vermont cases

cited by the state attorney are all within the qualification of the rule.

In *State v. Jones*, 33 Vt. 443, the indictment followed the words of the act—"did cut, injure, and destroy" aqueduct pipe, etc. The court said:

"The statute particularly describes the offense, in plain and simple language. The existence of no other fact is necessary to constitute the offense, than those named in the statute;" and held the indictment sufficient. In *State v. Cook*, 38 Vt. 437, it was held that the statute forbidding one to "enlist, recruit, or employ" any person, etc., was of itself complete; that it created and defined the offense, and the same ruling was had in case of an assault with the "wicked, wilful and malicious intent to kill and slay," in *State v. Daley*, 41 Vt. 564.

The respondent's counsel have cited the cases in this state that hold that an indictment in the words of a statute is insufficient. In *State v. Benjamin*, 49 Vt. 101, the respondent was indicted for aiding one in procuring liquors to be disposed of for unlawful purposes. The indictment was held defective in not setting out how the respondent aided. *State v. Higgins*, 53 Vt. 191, was under a statute against one's acting as agent, in traveling from place to place, and selling liquor unlawfully. Complaint held bad for not alleging the name of the principal. *State v. Miller*, 60 Vt. 90, requires, in an indictment under the statute forbidding a man's being found in bed with another man's wife under circumstances affording a presumption of an illicit intention between them, an allegation of what the illicit intention was.

Our cases have always recognized the rule and the exceptions thereto, and although the same technical strictness in criminal pleading is not required as when, in Blackstone's time, 160 offenses were punishable with death, still it is now necessary that the substantial acts constituting the crime should be clearly and distinctly alleged.

The indictment should have alleged the manner in which the print and writing were made public, and how the writing was published and circulated, or caused to be published and circulated. It may have been made public by printing in a newspaper, by spreading circulars broadcast through the streets, by nailing it to a telephone pole, by sending it through the mails, by leaving one upon every doorstep in the town, or in one

of the many other ways which the ingenuity of the modern advertisers might suggest. Without some allegation of the mode, the respondent may well insist upon his right given him by the organic law of the land (Const. Vt. c. 1. art. 10), "to demand the cause and nature of his accusation."

Judgment reversed, demurrer sustained, indictment adjudged insufficient and quashed, and respondent discharged.

Ross, C. J., dissents.

NOTE.—*Indictment—Description of instrument—Variance.*—The fact that an indictment charges an abortion as caused by an instrument, "the name of which is to the jury unknown," does not make a variance, though a witness had described the instrument to the jury. *Com. v. Noble*, 165 Mass. 13.

Evidence of defendant's guilt.—Conviction sustained by evidence showing that deceased became pregnant by defendant; that defendant inquired the means of producing an abortion, and stated that an appliance had been unsuccessfully used for that purpose, and that he had made arrangements with a doctor in another city to dispose of the case, and "get rid of it"; that after deceased returned she was attended by a doctor employed by defendant; that defendant endeavored to have others marry deceased; that defendant administered a drug, which produced a miscarriage; that deceased, in defendant's presence, charged him with her ruin; that deceased shortly afterward died, and that defendant wanted deceased buried quickly. *State v. Edmonson*, 131 Mo. 348.

Instruction.—A charge that unless the state proved that deceased was pregnant, and that defendant administered or caused to be administered, drugs for the purpose of procuring, and which did procure, an abortion, which was the cause of deceased's death, the jury should find defendant not guilty, required the jury to find every essential fact constituting the crime. *Id.*

STATE v. SCOTT.

(28 Oregon, 331.)

ADULTERY: *Evidence of accomplice—Corroboration.*

1. One who admits participation in adultery is an accomplice.
2. Where the accomplice testified that on a certain day, without previous agreement, she met defendant, shortly after abandoning her husband, and not desiring to be seen, she remained in the woods with defendant until evening, during which time they had sexual intercourse and lunched together; that she subsequently met defendant on a train, and

later went to a hotel with him, where they had intercourse; and the only corroborating testimony was that on said day a witness put up a lunch for defendant; that there was no pre-arranged meeting between the parties in the woods; that other witnesses saw them in the woods; that defendant took said train for another purpose than meeting said accomplice, and that they were seen on the train together—the evidence was insufficient to sustain a conviction for adultery.

Appeal from Circuit Court, Lane County; J. C. Fullerton, Judge.

Duncan Scott was convicted of adultery, and appeals. Reversed.

Geo. B. Dorris and *Geo. A. Dorris*, for appellant.
C. M. Idleman, Attorney General, for the State.

The defendant, an unmarried man, having been indicted, tried, and convicted of the crime of adultery, committed in Lane county with one Louisa Babb, wife of A. J. Babb, was sentenced to imprisonment in the penitentiary for the term of one year. From this judgment the defendant appeals, and assigns as error the denial by the court of his request that it instruct the jury to find a verdict of acquittal. Reversed.

MOORE, J. It is disclosed by the bill of exceptions that said Louisa Babb, the person with whom the adultery is claimed to have been committed, testified, as a witness for the state, over the defendant's objection, that, on July 12, 1894, concluding to abandon her husband, she engaged one Sid Horn to come to her house after her clothing, which he did on the following day; that she left her home in his company about 11 o'clock in the forenoon, and, after going a short distance, met, without any previous agreement, the defendant, whom she did not like, nor look upon as her friend, that, not desiring to be seen by others, she remained in the woods with the defendant until about 9 o'clock that evening, during which time she had sexual intercourse with him; that while in his company they ate a lunch consisting of pickles, cheese, cold beef and bread; that at the time last mentioned she went to Sid Horn's house, and in an hour or more thereafter the defendant called there, but soon went away; that, on the following morning at about 2 o'clock, she left Eugene on the train for Portland to seek

work and to visit the coast; that, on entering a car she saw the defendant, who told her to go into another car, which she found on entering to be the smoking car; that, on arriving at Portland the defendant ordered a cab, and she was conveyed to a hotel, where that night she occupied the same bed and had sexual intercourse with him. The following evidence was also offered and admitted over the defendant's objection, as tending to corroborate the testimony of Mrs. Babb: E. H. How testified that on July 13, 1894, he was engaged in the business of keeping a restaurant at Eugene, and at 8 o'clock in the morning of that day he put up a lunch for the defendant, consisting of sandwiches, pickles, cheese and cake. Sid Horn testified that about 9 o'clock in the forenoon of the same day the defendant came to his house and invited him to go fishing, but he declined the invitation; that he did not tell the defendant anything about his agreement to go after Mrs. Babb's clothing, or that she intended to leave her husband; that the defendant went with him in the direction of Mrs. Babb's house, but remained at the river fishing, while the witness went to the house after Mrs. Babb's clothing; that about 11 o'clock, having obtained the clothing, he returned in company with Mrs. Babb, to the place where he left the defendant; that Mrs. Babb, not desiring to go to the witness' house until evening, remained with the defendant; that about 4 o'clock in the afternoon of that day he and his wife, Lillian Horn, saw the defendant and Mrs. Babb together in the woods; and that the defendant on the morning of July 14th, left Eugene, to go to Vancouver, Wash., to get some horses he owned. Lillian Horn testified that she saw Mrs. Babb and the defendant together in the woods at about 4 o'clock in the afternoon of July 13th; and, also, that the defendant called at her house and saw Mrs. Babb about 10 or 11 o'clock that night, but soon went away. T. G. Hendricks testified that on the morning of July 14, 1894, he went on the train from Eugene to Portland; that, as he entered the car at Eugene, he saw the defendant seated therein, and also saw Mrs. Babb enter the car with a valise, and heard some one—but could not say who—tell her to go into another car. A. G. Mathews testified that he saw Mrs. Babb enter the smoking car of the train, at Eugene, on July 14th, and told her she ought to go into another car.

In view of this evidence, it is contended that Louisa Babb, if her testimony is to be believed, was an accomplice; that her admissions and confession have not been corroborated upon the material issue, and that the court erred in refusing to give the instruction requested. "At common law," says Strahan, J., in *State v. Jarvis*, 18 Or. 360 (23 Pac. 251), "and in the absence of any statute governing the subject, it was the practice of judges to tell juries that they might legally convict on the evidence of an accomplice alone, if they thought they could safely rely on his testimony, but at the same time, to advise them never to act on the evidence of an accomplice unless he be confirmed as to the particular person who was charged with the offense. 1 Whart. Cr. Law, § 785. And Baron Parke said that it had always been his practice to tell the jury not to convict the prisoner unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the person of the prisoner." 1 Wharton on Criminal Law, § 787, and authorities there cited. "It," says Gray, C. J., in *Com. v. Holmes*, 127 Mass. 424 (34 Am. Rep. 391), "has always been held that a jury might, if they saw fit, convict on the uncorroborated testimony of an accomplice. Lord Hale, Lord Holt and Lord Mansfield treated the question of his credibility as one wholly for the determination of the jury, without any precise rule as to the weight to be given to his testimony." But, whatever the rule may have been at common law, the statute now provides that "A conviction can not be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission." Hill's Code, § 1371. Louisa Babb's admission of her participation in the alleged commission of the crime makes her an accomplice, and hence the corroborative evidence necessary to convict the defendant must be such as tends to prove adulterous acts on his part. Hill's Code, § 680. In *Com. v. Bosworth*, 22 Pick. 399, Morton, J., in commenting upon evidence in corroboration of the testimony of an accomplice, says: "The mode of corroboration seems to be less certain. It is perfectly clear that it need not extend to the whole testimony; but, it being shown that the accomplice has testified truly in some

particulars, the jury may infer that he has in others. But what amounts to corroboration? We think the rule is that the corroborative evidence must relate to some portion of the testimony which is material to the issue. To prove that an accomplice had told the truth in relation to irrelevant and immaterial matters, which were known to everybody, would have no tendency to confirm his testimony involving the guilt of the party on trial. If this were the case, every witness not incompetent for the want of understanding, could always furnish the materials for corroboration of his own testimony. If he could state where he was born, where he had resided, in whose custody he had been, or in what jail or in what room in the jail he had been confined, he might easily get confirmation of all these particulars. But, these circumstances having no necessary connection with the guilt of the defendant, the proof of the correctness of the statement in relation to them would not conduce to prove that a statement of the guilt of the defendant was true."

In *State v. Odell*, 8 Or. 30, one William George, an accomplice, testified that he and the defendant waited outside while another person went into the building, and brought out the property described in the indictment. The testimony of other witnesses tended to prove that the defendant was in the town in which the theft was committed, about the time of the commission of the alleged crime, and that a sack of flour was missed from the place where the larceny was alleged to have been committed, but it was there held that such evidence did not tend to connect the defendant with the commission of the crime. In *State v. Townsend*, 19 Or. 213 (23 Pac. 968), an accomplice testified that he and the defendant stole a cow, which they drove from the pasture of the owner, and in pursuance of a previous agreement, delivered to other persons, at Pendleton, at which place she was butchered. The corroborative evidence was the testimony of a witness who said that on January 14, 1889, at about 8 o'clock in the evening, the accomplice left the house at which the witness was then staying, which was between four and five miles from Pendleton, and a short distance from the pasture from which the cow was stolen; that a little later the accomplice returned in company with the defendant, whom he introduced under an assumed name; that the defendant and

accomplice together, soon thereafter left the house, and the next day he heard the cow was missing. The owner of the cow also testified that she was stolen from his pasture on the night of January 14, 1889. The state having rested, the counsel for the defendant moved for a non-suit on the ground that there was not sufficient evidence of the defendant's guilt to be submitted to the jury; Lord, J., commenting upon the facts as elicited from the corroborative evidence, says: "They show that the defendant was not only in the vicinity when the crime was committed, but that he was there under a false name, and at night, and under circumstances not likely to occur without concert between him and his accomplice in furtherance of some common enterprise. In such case it can hardly be said that the facts do not tend, in some degree, to connect the defendant with the commission of the crime."

If there was any other evidence of the adulterous act, or of facts from which it could be inferred, and it was sought to prove the defendant guilty of it, the proof of the opportunity, and the corroborating evidence of circumstances surrounding it, might possibly, under the rule thus announced, be held sufficient to warrant a conviction. But in that case the crime was susceptible of proof by the person who lost the animal, while in the case at bar the only evidence of the commission of the crime is the testimony of the accomplice herself. "What appears to be required," says Roscoe, in his work on Criminal Evidence (volume 1, *p. 133,) "is that there should be some fact deposed to, independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference, not only that a crime has been committed, but that the prisoner is implicated in it." Tested by this rule, we are unable to discover any evidence, aside from Mrs. Babb's, which, taken by itself, leads to the inference that a crime even has been committed. There was no agreement existing between Mrs. Babb and the defendant to meet on that occasion, nor is there any evidence to show a previous familiarity between them, from which the evidence of the defendant's guilt can be inferred.

Mere proof of an opportunity to commit adultery is insufficient to convict a person of that crime, unless there be proof also of an adulterous mind on the part of both parties; and, to prove this state of mind, circumstantial evidence is admis-

sible to show a purpose or inclination to commit the act: Bish. St. Crimes, § 679. Mrs. Babb's desire to avoid her husband, and to seek seclusion, may have been, to her mind, a sufficient reason for not wishing to visit Horn's house in the daytime. So, too, the defendant's purpose to catch fish must be presumed to have been an honest one. And because he and Mrs. Babb met on the banks of the river, in the woods even, ate a lunch together, and were seen by others, does not necessarily or inferentially, in the absence of evidence of an adulterous mind, prove that they committed the crime of adultery; nor does the corroborating evidence even tend to show the commission of a crime, or any circumstance from which its commission can be inferred. The evidence shows that the defendant went to Portland on the same train with Mrs. Babb, but that in making the journey he had, at least, another purpose, which was to get his horses from Vanconver, Wash., while Mrs. Babb went to obtain work, and to visit the coast. If there was any corroborating evidence of adulterous intercourse between them at Portland, or if the place to which she went was a brothel, and it was proven that the defendant met her there, it might have been sufficient to infer the commission of the offense at the time and place alleged in the indictment. (Bish. St. Crimes, § 682.) But the evidence of Mrs. Babb as to their conduct in that city is not corroborated by any circumstance, except that she and the defendant were seen on the same train at Eugene. From an examination of all the testimony in support of Mrs. Babb's statements, we conclude that it does not corroborate the material issue, or present facts from which the commission of the crime can reasonably be inferred, and hence, under the statute, was insufficient to support the conviction, and that the court erred in refusing to give the instruction requested, for which reason the judgment is reversed, and a new trial ordered.

NOTE.—*Name alleged—Variance.*—Where the indictment charged the defendant with adultery with a woman by a certain name, and the evidence showed that he had committed adultery with a woman of a different name, instructions that the state must prove that the woman's name was as given in the indictment, or that she was sometimes known by that name, were proper. *Henderson v. State*, 105 Ala. 139.

Evidence of good character.—In all cases a person accused of a crime of any grade, whether a felony or a misdemeanor, has a right to offer in his defense testimony of his good character. *State v. Henry*, 50 N. C. 65;

State v. Johnson, 60 N. C. 151; *State v. Lawton*, 76 N. C. 216; 3 Am. & Eng. Enc. Law, 111. This right is not dependent upon the defendant's having been examined as a witness in his own behalf, and was recognized long before defendants were made competent to testify. It is limited to evidence of general character, and opens the door, which would be otherwise closed, to the prosecution to show the defendant's bad character, either by cross-examination or by other witnesses. *Rev v. Stanard*, 7 Car. & P. 673; 2 Hawk. P. C., c. 46, § 194. In excluding the testimony there was error. *State v. Hice et al.*, 117 N. C. 782.

STATE V. GOFF ET AL.

(117 N. C. 755.)

AFFRAY: Witnesses—Impeachment—Competency of evidence.

1. Where, on trial of four persons for an affray, three of them have testified, and the fourth, who was their antagonist, is called in his own behalf, his co-defendants have the same right to impeach him as though he were a state's witness.
2. On the trial of several persons for an affray, evidence that one of the defendants, who was the antagonist of the others, had stated to third persons on the day of the difficulty that, if one of his co-defendants came to his house that night, he must kill him, though admissible for the purpose of impeachment, is incompetent to prove motive.
3. It is error to exclude testimony offered for several purposes, if it is competent as to one of them.
4. Error in excluding evidence which is competent for the purpose of impeachment can only be remedied by *venire de novo*, though the facts excluded may have been subsequently brought out by other witnesses.

Appeal from Superior Court, Greene County; Graham, Judge.

John Goff, James and Frank Kearney, and George Gerganus were jointly indicted for an affray, and the first three defendants (appellants) named, being convicted, appeal. Reversed.

Messrs. Swift, Gallowsay and J. B. Batchelor, for defendants.
The Attorney General for the State.

AVERY, J. This was an indictment for an affray in which the theory of the state was that the defendants John Goff and the two Kearneys were the guilty combatants on the one side, and the defendant Gerganus, who was acquitted by the

jury, was a willing participant on the other side. After offering two witnesses on behalf of the state, the solicitor, following the usual practice, rested, and gave the parties the opportunity each to offer testimony criminating his antagonist or antagonists in order to exculpate himself. In such a contest the witnesses for the one side stand, as to the parties on the other, in the relation of prosecuting witnesses and defendants, and hence it is the universal practice to compel them to submit to cross-examination with all of the rights which are incident thereto when they are examined in chief on behalf of the State. The appellants had introduced their testimony and when Gerganus was upon the stand, as a witness in his own behalf, the other defendants had the same right to impeach him on cross-examination as though he had been a witness on behalf of the State, instead of a co-defendant. The state might have impeached him (*State v. Epler*, 85 N. C. 585), and the same privilege should have been allowed to his co-defendants. If the questions propounded by the counsel for defendants tended to elicit testimony showing the temper and bad blood of Gerganus toward his co-defendants, and was offered, not alone as substantive testimony against him as a defendant, but also in order to impeach him as a witness, it was unquestionably competent to examine the witnesses, whose names had been mentioned in connection with the time and place of making the declarations, to contradict his denial that he made them. *State v. Patterson*, 2 Ired., 346; *State v. Sam*, 8 Jones, 150. The history of the ruling excepted to and assigned as error, as it appears in the statement of the case, is as follows: "During the defendant Gerganus' cross-examination, he was asked by counsel for defendants, Goff and the Kearneys, this question, namely: 'On the day of the night of that difficulty, did you not tell Merrimon Ginn, at your house, that, if Goff and his friends came to your house that night, you would kill a man?' The witness answered that he did not. He was then asked, on behalf of the same defendants, this question, namely: 'On the same day, and at the same place, did you not tell Thomas Kearney that you were expecting John Goff at your house that night and if he came you would kill him or hurt him badly?' This was also answered in the negative. On the conclusion of the testimony on behalf of Gerganus no further evidence being offered by the state, the defendants John Goff,

James Kearney and Frank Kearney called in Merrimon Ginn and Thomas Kearney, the persons referred to in the cross-examination of defendant Gerganus, and both of whom had been duly sworn. His honor inquired, 'For what purpose were these witnesses called in?' The counsel for Goff and the Kearneys informed the court that he proposed by these witnesses to contradict Gerganus as to the threats referred to, and to prove the declarations of Gerganus as set out in the questions specified, and this was to show the animus of that defendant toward John Goff and James and Frank Kearney as affecting his testimony, as well as to account for his conduct on the night of the difficulty. Merrimon Ginn was then first offered with that view. The court refused to permit the witness to testify on the point named, and stated that it would not allow the proposed testimony from either of the witnesses as the matter was collateral. Defendants John Goff and James and Frank Kearney excepted to this ruling."

If the testimony was competent for either of the purposes indicated by counsel for the appellants, it was error to exclude it. It was clearly not competent to explain the conduct of Gerganus by connecting it with proof of motive. The guilt or innocence of Gerganus depended entirely upon the facts and circumstances connected immediately with the transaction. *State v. Norton*, 82 N. C. 623; *State v. Harrell*, 107 N. C. 944; *State v. Skidmore*, 87 N. C. 509.

If the court had admitted the testimony to contradict Gerganus it would have become necessary to caution the jury to consider it only for the purpose of impeaching. But it is not the less error to exclude testimony offered for a purpose for which it is competent, because coupled with that order is a proposition which is not tenable to admit it on another ground. Such an error is not cured even by allowing other witnesses to testify to the very same facts which were excluded on a cross-examination, but, said Pearson, C. J., in *State v. Murray*, 63 N. C., 31, "can only be remedied by *venire de novo*." It is true that Gerganus testified to facts which, if believed, would have corroborated the defendant Gerganus, and tended to show that John Goff and the two Kearneys fought willingly. But the jury, if they believed the other witness for the state, Joseph Goff, might have inferred that the other defendants did not fight willingly, and used no more force than was necessary to

disarm the defendant Gerganus and provide for their own safety. They all testified to substantially the same state of facts as Joseph Goff. As the testimony of Henry Gerganus and his kinsman would, it seems, if believed, have left no doubt as to the guilt of the other three, it was all important, in view of such a conflict, that the three appellants should have the benefit of any competent impeaching testimony. *Non constat*, if it had been admitted, but that Gerganus might have been found guilty, and they might have been acquitted. It may be that the testimony of Henry Gerganus, going to the jury, as it did, unimpeached and corroborated by that of Henry, led them to give credit to him, instead of to Joseph Goff and the three appellants. Whatever would have been the result, if no erroneous ruling had been made, or whatever may be the consequence hereafter, it seems clear that the appellants have been deprived of testimony, of which we know not the weight or worth, to the benefit of which they are justly entitled. The cases of *State v. Ballard*, 97 N. C., 443, and *Clark v. Clark*, 65 N. C., 655, are not in conflict with the principles we have stated as governing this case. There was no proposition in the case at bar to go into particulars of other transactions or difficulties, and set them up as tending to show bias. In such case, the danger of raising numberless issues to distract the minds of the jury would be obvious. But the proposition was to prove a threat of bodily harm to be carried into execution on that night, and at his own house, where the difficulty occurred. While this was not competent as evidence of motive, it was admissible to show temper. We conclude that the appellants are entitled to a *venire de novo*.

THE QUEEN v. WAUDBY.

(2 Q. B. D., 1895, 482.)

AIDING AND ABETTING: *Indictment for felonious wounding—Conviction of principal for unlawful wounding.*

Upon the trial of an indictment against two prisoners charging one with feloniously wounding with intent to do grievous bodily harm, and the other with aiding and abetting in the commission of the felony, if the principal be convicted of the misdemeanour of unlawfully wounding, the second prisoner may be convicted of aiding and abetting him.

Case stated by LAWRENCE, J.

John Waudby and William Waudby were tried upon an indictment which charged John Waudby with feloniously, unlawfully and maliciously shooting at William Featherstone with intent to do him grievous bodily harm, and William Waudby with feloniously aiding, abetting and assisting John Waudby to commit the said felony. A second count charged John Waudby with feloniously, unlawfully and maliciously wounding William Featherstone with intent to do him grievous bodily harm, and William Waudby with feloniously aiding, abetting and assisting.

The jury found John Waudby guilty of unlawfully wounding, and William Waudby guilty of aiding and abetting. It was objected on behalf of William Waudby that as he was aiding and abetting a misdemeanour, he was entitled to be acquitted on the said indictment. The learned judge overruled the objection and released William Waudby on recognizances to come up for judgment when called upon. The question for the court was whether the learned judge was right in so holding.

No counsel appeared to argue the case.

LORD RUSSELL, OF KILLOWEN, C. J.: I am of opinion that the ruling of the learned judge was clearly right. The charge was one of felony, John Waudby being charged as the principal, and William Waudby with aiding and abetting. The jury negatived the felony, but found John guilty of a misdemeanour, and William of aiding and abetting. Where a person is charged with aiding and abetting, if he is found guilty of aiding and abetting a misdemeanour, he is guilty as a principal, for there are no degrees of guilt in misdemeanour. The statutory authority upon the point seems clear. By 14 and 15 Vict. c. 19, § 5, if a prisoner is charged with feloniously wounding (*Reg. v. Miller*, 14 Cox, 356, and Archibald's Criminal Pleading, p. 745, 21st Ed.), and the jury are satisfied that he is guilty of the actual wounding, but not of the felony, they may acquit him of the felony charged, and convict him of the misdemeanour of unlawfully wounding. And by 24 and 25 Vict. c. 94, § 8, a person aiding or abetting in the commission of a misdemeanour is liable to be tried, indicted and

punished as a principal. Here the jury have negatived the felony, and, there being no secondary guilt in misdemeanour, the prisoner William was a principal offender, and was liable to be convicted and punished as such.

POLLOCK, B., GRANTHAM, LAWRENCE and WRIGHT, JJ., concurred.

Conviction affirmed.

NOTE.—*Principals—Aiders and Abettors.*—In *Travis v. Com.*, 96 Ky. 77, it is declared as the well settled doctrine of the court that two or more persons indicted as the actual perpetrators of a crime may be convicted as principals although some of them were merely aiders and abettors. *Thompson v. Com.*, 1 Metc. (Ky.) 13; *Young v. Com.*, 8 Bush, 366; and *Mulligan v. Com.*, 84 Ky., 229.

Joint defendants.—An indictment against several joint defendants is none the less an indictment against each of them individually. *Id.*

STATE V. GORHAM.

(67 Vt. 365.)

ARSON: *Prosecution for arson—Evidence—Confessions—Instructions—Opinion of witness.*

1. The voluntary confession of one accused of arson, though made while in custody, without counsel, and expecting to die from the effects of poison, is admissible against him on the trial.
2. Testimony of a witness that he had advised the prisoner to confess, introduced after the confession had been given in evidence—the court not being asked, after the introduction of such testimony, to exclude the confession, and the prisoner's own evidence tending to show that he was not influenced by the advice—was not ground for questioning, on appeal, the admissibility of the confession.
3. The opinion of an officer, on cross-examination, as to whether certain facts to which he had testified in chief on trial of one he had arrested were suspicious circumstances, was properly excluded, in the absence of evidence that he had acted by reason of suspicion.
4. Where one count in an indictment charged the burning of certain buildings, and another count charged the burning of such buildings with intent to defraud the insurance company, it was not error for the court to state to the jury that, if they found the accused guilty on the first count, they would probably find him guilty on the second also.
5. When undisputed testimony showed that one accused of arson had tried to sell the property to different persons, a charge reciting that there

seemed to be no controversy that the prisoner, previous to the burning, was anxious to dispose of the property, was not error.

6. A charge that the jury, when considering a confession which the prisoner admitted having made while in jail, and expecting to die from the effect of poison, but the truth of which he denied, had the right to say whether, under such conditions, he would have been likely to construct a false story fitting the circumstances of the alleged crime, as shown by the undisputed evidence, was not error.
7. A statement by the court to a jury upon their being sent back after disagreement, to further consider the case, that the trial had been "quite expensive to the state, and the expense ought not to be thrown away," accompanied by reasons showing that the prisoner's interests would be served by a determination of the case, was not erroneous, as attempting to induce an agreement on account of the expense to the state.

Exceptions from Orange County Court; Ross, Chief Judge.
W. M. Gorham was convicted of arson, and excepts. Affirmed.

R. M. Harvey and *J. K. Darling*, for respondent.
Geo. L. Stowe, State's Attorney, for the State.

ROWELL, J. The prisoner's confession to Mrs. Parish was made when he was shackled and in custody, without counsel, and expecting to die from the effects of poison taken after his arrest. Testimony was introduced by both sides on the preliminary inquiry whether the confession was voluntary, or whether Mrs. Parish held out inducements to the prisoner, and thereby obtained it. The court found that the confession was made of the prisoner's own motion, without any inducement, and admitted it in evidence. The prisoner excepted to its admission, and especially because it was made when he was without counsel, and also excepted to the court's determining from the testimony whether it was voluntary or obtained by inducements, and to be admitted or rejected accordingly.

It will be seen from the cases cited in the note to *Daniels v. State*, 6 Am. St. Rep. 243, and from *State v. Patterson*, 73 Mo. 695, 707, and *Jackson & Dean v. State*, 69 Ala. 249, that none of the circumstances in which the confession was made, it being voluntary, rendered it inadmissible. In the case last cited, confessions were admitted that were made while the accused were in prison, to an officer in authority, in the absence of friends and counsel, it appearing that no threats nor promises were made. There are some cases to the contrary, but we are not

inclined to follow them, as we regard them opposed to the weight of authority and to the reason of the thing. But of course the circumstances in which a confession is made are always to be considered in determining its weight as evidence, although they do not make it incompetent testimony.

It is for the trial court and not for the jury to say whether a confession is admissible or not; and if the testimony on that preliminary inquiry is conflicting, the decision of that court is final; but if not conflicting, its decision admitting the confession is revisable here. This is not denied, but it is strenuously claimed that this case comes within the latter part of this rule, for that the undisputed testimony of the witness Hyzer shows that he had a talk with the prisoner just before he confessed to Mrs. Parish, wherein he told the prisoner that, if he did it, it would be very much better for him to make a clean breast of it. This point was argued by both sides as though Hyzer testified on the preliminary inquiry, whereas the fact is, as shown by the testimony, that he did not testify on such inquiry, nor testify at all until he was called by the prisoner when putting in his testimony on the main case, and the prisoner's testimony does not show that he claimed to have been influenced in the least by what Hyzer said to him. Besides, it does not appear that the court was asked when Hyzer's testimony came in to then exclude the confession, nor to take any other action in view of his testimony. It appears, therefore, that the matter of Hyzer's testimony on this point affords no ground for the argument based upon it.

On cross-examination of the officer who arrested the prisoner and who hoped for the rewards that had been offered, the prisoner's counsel were not permitted to ask the witness whether he thought certain things to which he had testified, mostly in chief, were suspicious circumstances. It does not appear that the witness had testified to having had his suspicions aroused, nor to having done anything by reason of his suspicions, nor that he characterized as suspicious anything to which he had testified, but rather the contrary appears. The matter falls, therefore, within the rule that a witness is not to give his opinion, nor to characterize his testimony, because it is irrelevant.

The court told the jury that if one purposely burns his own buildings or the buildings of another, designing it to be shown

to be an accidental fire and the insurer made to pay the loss, he intends to defraud the insurer. It then went on to say that if they found the prisoner guilty under the first count, which was for burning the barn and outbuildings, they would probably be pretty likely to find him guilty under the fourth count also, which was for burning said buildings with intent to defraud the insurance company. To this last statement the prisoner excepted, but it was not error. It can scarcely be conceived that the jury would not do that, but it was left wholly to them to say whether they would or not.

The testimony tended to show that the prisoner had tried to sell the farm and personal property to two or more persons, and he admitted on the stand that he had tried to sell it to two of those persons. The court told the jury that there seemed to be no controversy but that the prisoner, at the time in question, was anxious to dispose of the property, to which he excepted. While the court should not in its charge assume as true, matters that are in dispute, yet it may assume as true matters that are not in dispute, or matters that were at first in dispute, but in the course of the trial have come not to be in dispute, but to be tacitly or otherwise treated as true by both sides, and the case thereafter tried on that theory. When a change of this kind takes place, as often happens, the court may treat the case, in this regard as the parties have treated it, and charge accordingly. It does not appear that the court did more than that in this case. Indeed, it is to be assumed that what the court said in this regard was true, it not appearing to be untrue. The testimony is not made a part of the exceptions on this point.

The prisoner admitted on the stand that he made the confession testified to by the witnesses on the part of the state, but said it was all false. At the time he made the confession there had been no examination before the magistrate, and it did not appear that he knew what evidence the state claimed to have against him. The court told the jury that when considering the confession they had a right to say whether it was probable that at that time the prisoner, in his condition and prospects, would have gotten up and concocted a false story that would fit right into all the surrounding circumstances, as this one did—whether he could in that short time have concocted this story, and had it fit in to the burning, to hearing

the team go by, going to bed and staying till his sister called him up, spilling the kerosene oil, carrying off his clothes, making tracks, and all those things, just what they found he did say, and yet it all be false. The prisoner excepted to this, and says that the "surrounding circumstances" were neither admitted nor agreed upon, and that, therefore, the court could not say that the confession fitted into them. This criticism might have force if it appeared that the circumstances alluded to by the court were not practically undisputed; but, as it does not thus appear, it is without force.

The jury, after being out all night, came in, disagreed, but wanted no further instructions. The court, however, said to them, that they had some occasion to inquire whether there might not possibly have been some other party around there, but that that was not the question to be tried; that the only question to be tried was, whether the fire was a criminal fire and the prisoner the criminal; that the other question that there was some suggestion of by some of the testimony, had not been investigated, and could not be investigated except to say that it showed that it might be probable or possible that it was a criminal fire and some one else had to do with it.

If this amounted to charging the element of another's guilt out of the case, or if there is fair ground for thinking that the jury may have so understood it, it would be error. But it is considered by a majority of the court that it did not amount to that, and that there is no fair ground for saying that the jury may have thought it did. It is to be presumed that proper instructions had been given on this point, before; and this additional instruction put the matter in its true light when it said that the scope of that inquiry was, if the fire was criminal, whether some one else had to do with it. It was not necessary for the jury to be told in order to know that the more the testimony showed against another the less it showed against the prisoner; but, if it was necessary it is to be presumed that they had already been told that. There was no error here.

The court returned the jury for further consideration, and in doing so said to them, lest they should think its action unreasonable, that the trial had occupied five days; that the testimony was lengthy, covered a good many points, had been fully discussed, and could be looked at in many different lights;

that it was important to the prisoner and to the state that the case should be determined; that it had been quite expensive to the state, and that that expense ought not to be thrown away if it could be avoided; that the court had to have these considerations in mind when a jury asked to be discharged, and that the court thought the jury should have them in mind. It is claimed that by this the court injected into the case the element of expense to the state as a proper matter to influence an agreement. But we do not so regard it. It is manifest that the court intended merely to reconcile the jury to a return, and to quicken them to a renewed effort to make true deliverance between the state and the prisoner according to the evidence and the laws, as they had sworn to do; and there is no fair ground for supposing that they understood it otherwise, as a majority think.

There is no error in the proceedings, and the prisoner takes nothing by his exceptions.

NOTE.—Instructions must be based on evidence.—In the trial of a criminal case before a jury, the jury are the sole judges of what facts have been proven by the evidence, and the court has no right, in the instructions, to assume that certain facts have been proven. *Ellis v. People*, 153 Ill. 344. Whether the defendant had made threats to burn the property, or conceal bed clothing, oil cans, dresses, or any other article, was a question of fact, for the jury to determine from the evidence. There was a conflict in the evidence in regard to those matters which the court directed the jury were proven, and if the jury had been left free to pass upon those questions of fact they might have found in favor of the defendant, and such finding, no doubt, would have resulted in a verdict for the defendant. But, whether that would have been the result or not, it was the right of the defendant to have the jury determine for themselves the facts which the evidence established, and it is plain that the instruction in question took that right away from the jury. *Id.*

It is error for the court to assume the existence of an important fact which is not conceded or established by uncontradicted proof. *State v. Lewis*, 56 Kan. 374.

Offense against habitation.—Arson is an offense against the habitation, and affects possession rather than property. *People v. Fairchild*, 48 Mich. 31; *Woodruff v. People*, 62 N. Y. 117; *Regina v. Truman*, 8 Car. & P. 727.

Under section 54 of the Criminal Code, it was erroneous, over proper objections, to try a defendant upon the charge of burning a schoolhouse, joined with one for causing such burning to be done by another person. *Wendell v. State*, 46 Neb. 923.

Where, in a criminal case, it is shown that a certain letter is in defendant's handwriting, and that it was received through the mail by the person to whom it was written, it is not error to admit the envelope, though the

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address is not shown to be in defendant's handwriting. *State v. Harvey*, 131 Mo. 339.

In a criminal case it is error to give an instruction which casts on defendant the burden of establishing an alibi. *Id.*

Witness.—A witness in a criminal case, who testifies that he has seen defendant write his name, is acquainted with his handwriting, and has received letters from him, is competent to give his opinion as to whether a letter is in defendant's handwriting. *Id.*

It is not necessary that a witness as to defendant's handwriting should state positively that a certain letter is in defendant's handwriting, to entitle it to go to the jury; but it is sufficient if witness state that he is acquainted with his handwriting, and that, in his opinion, the letter was written by him. *Id.*

On a trial for arson, it was not error to permit a witness to testify that, a short time before the burning, defendant was complaining that the prosecutor claimed too much rent of him; that the witness asked him what he was going to do about it, and defendant replied, "I'll burn it." *State v. Lytle*, 117 N. C. 799.

Cross-examination.—Where, in a case of arson, the defense is alibi, and defendant, as a witness, simply states that he was not present at the time and place of the fire, it is proper cross-examination to ask him where he was at the time the property was burned. *State v. Harvey*, 131 Mo. 339.

Alibi.—In a criminal case, where the defense was an alibi, it was error to refuse to charge that the state must show the presence of defendant at the time and place of the alleged commission of the crime, and if the jury believe defendant's evidence sufficient to raise a reasonable doubt, or if the state's evidence is so defective as to raise a reasonable doubt, or if, taking the whole evidence on the question of alibi, there is a reasonable doubt of defendant's guilt, they should acquit. *State v. Harvey*, 131 Mo. 339.

JORDAN v. STATE.

(142 Ind. 422.)

ARSON: *Indictment—Allegation of ownership—Witness—Husband and wife—Privileged communications.*

1. An indictment for burning a certain "flouring, grist and corn mill-house" sufficiently alleges the burning of a building.
2. An indictment for arson alleging the building burned as the house "of" a certain person sufficiently alleges that it was the property of such person.
3. The Civil Code of Indiana provides that husband and wife are incompetent to testify as to communications made to each other. The criminal procedure act provides that the rules of evidence as prescribed in civil cases shall apply in criminal cases, except as further provided, and further provides that the "party injured by the offense committed"

shall be a competent witness. *Held*, in a prosecution for arson against the wife, the husband, as the party injured, being a part owner of the property burned, may testify against his wife as to communications between them.

Appeal from Circuit Court, Knox County.

Louise Jordan was convicted of arson, and appeals. Affirmed.

II. Burnes and J. S. Pritchett, for appellant.

Wm. A. Ketcham, Attorney General, *John T. Goodman*, Prosecuting Attorney, *W. A. Cullop* and *C. B. Kessinger*, for State.

HACKNEY, J. By indictment the appellant was charged with having "unlawfully, feloniously, wilfully and maliciously set fire to and burned a certain flouring, grist and corn mill-house of Samuel A. Jordan, Aaron G. Jordan and Winfield S. Lane," etc. A motion to quash the indictment was overruled, and upon a trial by jury, the appellant was found guilty as charged. The only assigned errors of the trial court are in overruling the motion to quash the indictment and in overruling a motion for a new trial. It is contended that the indictment was insufficient in failing to charge the burning of a building, and in failing to charge that such building was the property of another. The statute defining the crime of arson provides that "Whoever wilfully and maliciously burns, or attempts to burn, any dwelling house or other building * * * being the property of another, * * * is guilty of arson." "Mill-house" has no meaning not implying a building. By the ordinary use of the word "house," it is understood to mean a building, and when taken in connection with the words "flouring," "grist," "mill," etc., it is capable of but one meaning. This has been very clearly decided in a case similar to the present. See *Ford v. State*, 112 Ind. 373.

The charge that it was the "mill-house of Samuel A. Jordan," etc., sufficiently charged that such mill-house was the property of those named. This exact question was decided against the views of the appellant in *Wolf v. State*, 53 Ind. 30.

The two objections to the indictment thus stated could not have been passed upon in any other manner in view of the statutory provisions that "The words used in an indictment

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* * * must be construed, in their usual acceptance, in common language," (Rev. St. 1894, § 1805,) and that an indictment is sufficient if "the offense charged is stated with such a degree of certainty that the court may pronounce judgment, upon a conviction, according to the right of the case" (Rev. St. 1894, § 1824).

The next question, arising upon the motion for a new trial, is the alleged error of the court in permitting Aaron G. Jordan, the husband of the appellant, to testify as a witness on behalf of the appellee that, prior to the burning of the mill, the appellant had declared to him her intention to burn the mill, and that after its destruction she had told him that she did burn it. The objections made at the trial and repeated in this court are that such communications from the wife to the husband are privileged, and that he was, therefore, an incompetent witness as to such communications.

By the Civil Code (Rev. St. 1894, §§ 504, 505), all persons, except those specifically exempted, are made competent witnesses in civil actions. Of those specifically declared incompetent are "husband and wife, as to communications made to each other." By the criminal procedure act, Rev. St. 1894, §§ 1865-1867, it is provided that "The rules of evidence prescribed in civil cases and concerning the competency of witnesses shall govern in criminal cases, except as otherwise provided in this act." It is further provided that "The following persons shall be competent witnesses:

* * * Second. The party injured by the offense committed." There can be little doubt, we think, that the effect of these various provisions is that, with reference to criminal procedure, the "Husband and wife, as to communications made to each other," are incompetent witnesses except that if either is "The party injured by the offense committed" he or she is a competent witness. Such was the holding of this court in *Doolittle v. State*, 93 Ind. 272. Appellant's learned counsel concede that this is the effect of these provisions, but they seek to limit the application of the phrase, "The party injured by the offense committed," so far as it includes husband and wife, to such injuries as result from the personal violence of either upon the other. This insistence is upon the theory that at common law the wife was competent to testify against her husband and the husband against the wife only in cases involving the per-

sonal safety or liberty of either; that the rule of the common law should be so sacredly upheld, in the interest of the marriage relation, that a legislative intention to abridge that rule must be clearly and explicitly stated before the courts will give it recognition. This intention, it is urged, is not apparent from the statutory provisions above quoted. This position was denied as early as the case of *Hutchason v. State*, 67 Ind. 449, where the wife was permitted to testify to the acts of the husband in the commission of the arson there charged. It was held that "The legislative intent is so apparent, and the language of the statute so explicit, that no room exists for construction or doubt," and that such intent was to make the wife competent as to everything excepting "communications."

In *Doolittle v. State*, *supra*, it was expressly held that the phrase "The party injured by the offense committed," together with the context, created an exception to the rule of incompetency as to "communications." So we find that the adjudged meaning of our statutes is to admit either the husband or the wife to testify in criminal prosecutions against the other when he or she is "the party injured by the offense committed," whether the evidence involves communications or acts which are part of the *res gestæ*.

It is further claimed by appellant's counsel that the husband was not "the party injured by the offense committed," since the offense was in destroying property, and that, too, in which he was but an owner in common with others. To this proposition is cited *Bassett v. United States*, 137 U. S. 496, a case where the husband was prosecuted for bigamy, and it was held that, under the statute of Utah, the wife could not testify to the husband's confessions of guilt made to her, for the reason that, while the offense was one of disloyalty to the marital relation, and a deep humiliation to the wife, it was, nevertheless, but a crime against the relation, and not against the wife. There the statute, considered as excluding husband and wife as witnesses, contained an exception as "to criminal action, or proceeding, for a crime committed by one against the other." This provision, however, was in the civil code, and, as will be observed, was negative in form. There the criminal code contained the following provision: "Witnesses, competent in civil actions, are competent also in criminal proceedings. Except with the consent of both, or in cases of

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criminal violence upon one by the other, neither husband nor wife are competent witnesses for or against each other, in a criminal action or proceeding, to which one or both are parties." Utah, 2 R. S., 1888, p. 743. It will thus be seen that the negative exception of the civil code was construed as granting no right to the wife to testify in a criminal prosecution against her husband, when the criminal code expressly excluded her as such witness. So far, therefore, from constituting an authority in favor of appellant's contention, we think it has no bearing upon the question. Our statute very plainly makes the husband or wife a competent witness where he or she is "the party injured by the offense committed." The word "injured," as employed, must be construed in its plain, ordinary and usual sense. R. S., 1894, § 240. It is not to be limited to personal or physical injuries, but in its plain, ordinary and usual sense, it signifies: the privation of a legal right; a wrong; a tort. And. Law Dict. "'Injury' means, in general, any wrong or damage done to a man's person, rights, reputation or goods." 11 Am. & Eng. Enc. Law, p. 1, note 1. In *Fople v. Howard*, 17 Cal. 664, one of the statutes in review provided that "the party or parties injured shall, in all cases, be competent witnesses," and the court, speaking by Mr. Justice Field, said: "By 'injured party' is meant the person who is the immediate and direct sufferer from the offense committed." The husband was an injured party, and to hold that his competency must turn upon and be defeated by the fact that others were likewise injured by the arson, would be unduly technical and narrow.

Objection is further made that the evidence did not support the verdict. In this, we think, counsel are in error. There was evidence reasonably supporting the verdict in every material element of the charge.

Finding no error in the judgment of the Circuit Court, the same is affirmed.

NOTE.—*Special or qualified ownership of property burned.*—Through a statute of Massachusetts, under which a bridge was purchased and laid out as a public highway, and the care thereof given to certain cities, a county which pays one-half the costs and expenses for its maintenance has such a special property therein as would support an allegation of ownership in an indictment for the burning of the bridge. *Com. v. Fitzgerald*, 164 Mass. 587.

Discussing the distinction between the right of property and the easement over the highway, the court say:

"But the easement is one thing and the structure and materials composing a bridge or way are another thing. They are analogous to erections on the land of another under a right secured for that purpose by the party erecting them. As long as the ways exist, they form a part of them, and are subject to use by the public; but, when the ways are discontinued or abandoned, the structures and materials entering and forming a part of them revert, not to the public or to the landowner, but to the counties, cities and towns that furnished them and paid for them, and which, therefore, while they continued to be used by the public, have a qualified or special property in them. *Town of Troy v. Cheshire R. Co.*, 23 N. H. 83; *Bidelman v. State*, 110 N. Y. 232; *Shirk v. Board*, 106 Ind. 573; *Greely Tp. v. Board of Com'rs of Saline Co.*, 26 Kan. 510; *Harrison v. Parker*, 6 East, 154; *Corporation of Wellington Co. v. Milton*, 10 C. P. (Prov. Ont.) 124; *Elliott, Roads & S. 30*; *Corwin v. Cowan*, 12 Ohio St. 629; *Wagner v. Railroad Co.*, 22 Ohio St. 563. See *Inhabitants of Freedom v. Weed*, 40 Me. 383. The bridge in this case was laid out as a highway, which, strictly speaking, would constitute it a county way (*Denham v. Commissioners*, 108 Mass. 202); and to some extent, no doubt, the county commissioners had authority over it (St. 1888, c. 313). Whether or not it was wholly the property of the county we need not consider, since, under the principles above stated, it is clear that the county had a qualified or special property in a part of it, and that was enough to sustain the indictment."

Possession.—In *State v. Fish*, 27 N. J. L. 324, which was an indictment for arson, charging the defendant with burning the property of another, the court held that the indictment was not sustained, if it appears by the evidence that the accused was in possession of the property under a contract to purchase it. And it is there held, that if a landlord or reversioner sets fire to his own house, of which another is in possession under lease, etc., it is arson, for, during the lease, the house is the property of the tenant. *Harris's Case*, Foster, 113; 4 Bla. Com. 222; *Roscoe's Cr. Ev.* 199.

So if it be in possession of a copyholder. *Spalding's Case*, 1 East's P. C. 1025; 1 Leach's Crown Law, 218.

The principle of the rule is, that it was for the protection of the person in the actual and immediate possession of the house. The offense is against the possession of another. *Breene's Case*, 1 Leach, 220; 2 East's P. C. 1026; *Pedley's Case*, 1 Leach, 235; 1 Hale's P. C. 567, note: 3 Chitty's Cr. L. 1106. And the court will not inquire into the tenure or interest which such person has in the house burnt. It is enough that it was his actual dwelling at the time. 2 J. R. 104; 12 Verm. 93.

Ownership—Allegation and proof.—The 30th section of the act for the punishment of crimes (Nix. Dig. 164) is simply declaratory of the common law crime of arson. It enacts that if any person shall wilfully and maliciously burn the dwelling house of another, or any outhouse that is parcel thereof, he shall be adjudged guilty of arson. It is conceded that the offense described in this section is, as in cases of arson at common law, an offense against the possession, and that the dwelling house of another means a dwelling in the possession of another; and that if a tenant in possession burn the dwelling of his landlord, or if the tenant in fee burn his own dwelling

to defraud a mortgagor or an insurer, he is not guilty of arson under the statute. So the court properly instructed the jury, and, in accordance with that instruction, the defendant was acquitted on the first count of the indictment. 27 N. J. L. 324.

In *State v. Lyon*, 12 Conn. 486, it is held that to constitute the offense of burning a shop, under our statute, it must be alleged and proved, that the building burned was the property of another; such property consisting either of the entire interest, or such a possession as gives a special property while it exists.

Where an information for burning a shop alleged, in one count, that it was the property of B and C as trustees of D, and in another, that it was owned by B and C jointly, no evidence whatever was offered in support of the former allegation, and in support of the latter, the only evidence was the testimony of one witness, that at the time the shop was burned, he was employed at work therein, by B, and of another witness, that at the same time the prisoner was at work in the shop in the employment of E; it was held that this evidence was insufficient to justify a conviction of the prisoner; and a verdict against him was set aside, as a verdict without evidence. *Id.*

In *People v. McCoy*, 20 Cal. 76, it is held that averments of an indictment for arson must be direct and certain as to the ownership of the dwelling house which the defendant is accused of burning. An indictment which leaves the question of ownership to rest upon conjecture, or to be made out by argument, is demurrable.

The allegation of the ownership of the building burned is a part of the description of the offense, and it must be direct that the building was the property of the person who at the time was occupying it in his own right. *Id.*

Thus where the language of the indictment in reference to the ownership was, "which said dwelling house was then and there the property of one Lemon" and was then and there the dwelling house of one Chinaman, a human being whose real name is to the jury unknown, held, on demurrer, that the indictment was insufficient. *Id.*

An indictment for arson which contains two averments as to the ownership of the dwelling house, either of which without the other is good, but which are repugnant to each other, is demurrable. *Id.*

Married woman's act—Husband and wife.—In *Snyder v. People*, 26 Mich. 105, in discussing the "Married Woman's Act," Mr. Justice Cooley says: "It must be evident from this summary of the law on this subject, that if the husband, living with his wife, has a rightful possession jointly with her of the dwelling house which she owns and they both occupy, he can not, by common law rules, be guilty of arson in burning it. It remains to be seen whether the statutes have introduced any changes which would affect the case.

"It is said that the wife is entitled to support at the husband's domicile, and she may prevent his disposing of it. The statute has not given him a corresponding right to impede or preclude conveyances or incumbrances by the wife, but nevertheless, as long as they occupy together, he is not to be considered as being upon the premises by sufferance merely. He is there by right as one of the legal unity known to the law as a family, as having important duties to perform, and responsibilities to bear in that relation, which can only be properly and with amplitude performed and borne while

the legal unity represents an actuality as having rights in consort, and offspring which can only be valuable reciprocally while the one spot, however owned, shall be the home of all; and in many ways he still represents the family in important relations of society and government. Some of the legislation on the subject is exceedingly crude; some of it has injudiciously given powers to the wife in the disposition of property which it has prudently denied to the husband; but none of it makes the husband a stranger in law in the wife's domicile. The property is hers alone, but the residence is equally his; the estate is in her, but the dwelling house, the *domus*, is that of both.

"If, therefore, the husband shall be guilty of the great wrong to his wife and family, of setting fire to the house they inhabit, he is no more guilty of arson in so doing than the wife was at common law for a like wrong to the dwelling house of the husband. The case is a very proper one for a penal statute, but none has yet been enacted to meet it. The house, in legal contemplation, as regards the offense under consideration, is the dwelling house of the husband himself."

STATE V. LIGHTSEY ET AL.

(43 S. C. 114.)

ASSAULT: *What constitutes—Instructions—Trespasser.*

1. Pointing a gun at another within shooting distance may constitute an assault.
2. Error in a charge is cured by recalling the jury and correcting the defect.
3. One is not justified in using force to expel a mere trespasser on his land.

Appeal from General Sessions, Circuit Court of Barnwell County; D. A. Townsend, Judge.

M. M. Lightsey and M. S. Lightsey were convicted of aggravated assault, and appeal. Affirmed.

Davis & Holman, for appellants.

Solicitor Bellinger, for the State.

GARY, J. The above-named defendants were indicted for an assault with intent to kill. They were tried at the summer term (1894) of the court of general sessions for Barnwell County, before his honor, Judge D. A. Townsend. Under the charge of the presiding judge the jury found them guilty of an assault of a high and aggravated nature on the second count

in the indictment, and they were sentenced to pay a fine or be imprisoned in the state penitentiary. The testimony is not set out in the case, nor is there any statement of the facts upon which they were convicted. The charge of his honor, the presiding judge, can not properly be construed except in the light of the testimony in the case, or upon an agreed statement of the facts. Where neither the testimony nor an agreed statement of the facts appears in the case, the exceptions only present abstract questions of law. But, waiving such objections, the exceptions can not be sustained.

The first exception is as follows: "Because his honor erred in charging the jury that an assault may be committed by simply pointing a gun at another." The charge of the presiding judge on this point was as follows: "A simple assault is an attempt to do bodily harm, but fails—falls short of doing the harm, touching the body, doing the battery. For instance, the example usually used is striking at another within striking distance, but not striking him; pointing a gun at another within shooting distance, but not shooting. These are the examples usually used to illustrate what an assault is, but assaults may be committed, however, in a great many other ways. For instance, striking with a stick without hitting, within striking distance; pointing a gun within shooting distance. Those are the examples usually used, but I say an assault may be committed in a great many other ways." In this we see no error.

The second exception is as follows: "Because his honor erred in charging the jury that before any one can excuse himself from murder he must be able to show beyond a reasonable doubt that he did it from necessity." His honor recalled the jury, and corrected that part of his charge referred to in this exception. This exception can not, therefore, be sustained.

The third exception is as follows: "Because his honor erred in recalling the jury from their room after they had retired to deliberate upon the case, and recharging them as to the law of the case, there being no request for such action on the part of the jury." The principle governing such cases is found in the case of *Hopt v. People*, 104 U. S. 631, in which the court says: "But, independently of this consideration as to the admissibility of the evidence, if it was erroneously ad-

mitted, its subsequent withdrawal from the case, with the accompanying instructions, cured the error. It is true in some instances there may be such strong impressions made upon the minds of a jury, by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by the admission; and in that case the original objection may avail on appeal or writ of error. But such instances are exceptional. The trial of a cause is not to be suspended, the jury discharged, a new one summoned, and the evidence retaken, when an error in the admission of testimony can be corrected by its withdrawal, with proper instructions from the court to disregard it. We think the present case one of that kind. *State v. May*, 4 Dev. 330; *Goodnow v. Hill*, 125 Mass. 589; *Smith v. Whitman*, 6 Allen, 562; *Hawes v. Gustin*, 2 Allen, 402; *Dillin v. People*, 8 Mich. 369; *Specht v. Howard*, 16 Wall. 564." The third exception is overruled.

The fourth exception is as follows: "Because his honor erred in charging the jury that a man has not the same right to repel force by force out on his lands away from his castle that he has in his home." His honor charged the jury that "out on the land, away from his castle, he has not the same right there that he has in his home. * * * If a man warns another off his place, and that man comes on it, he is guilty of a crime—a misdemeanour; and for that misdemeanour he may be tried in court. Of course, the law prescribes the same in regard to his home, but he has an additional right to put him out; and use sufficient force and put him out, but the force must not be disproportionate." In this there was no error.

The fifth exception is as follows: "Because his honor erred in charging the jury that M. M. Lightsey had no right to carry his gun on his own premises." After his honor had charged the jury as stated, in reviewing the fourth exception he added: "But I charge you, a man has no right to take his gun and run a man off his place. That is simply taking the law into his own hands." In this there was no error.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

NOTE.—Assault—Teacher and Pupil.—The punishment which a teacher may administer to a pupil, is, by provision of statute, required to be moderate, and a teacher, for giving an unruly pupil sixty-six blows with his hands, where the pupil remained insubordinate until the sixty-third stroke,

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may be convicted and punished for assault. *Whitney v. State*, 33 Tex. Cr. Rep. 172. The appellant, a school teacher, was convicted of a simple assault upon one of his pupils, a boy seventeen years of age. The boy carried a small bottle of brandy cherries to the school and divided it among the other pupils, and was punished therefor by appellant. The boy counted aloud the blows as they were given, until he had received sixty-three, and then ceased to count, whereupon appellant gave him three more. Appellant stated that he whipped him with his right hand until it was numbed and then changed to his left, and intended to continue the whipping as long as the counting continued or he was worn out. The boy was much bruised and stiff from the beating.

Mr. Justice Simpkins, speaking for the court, says: "While the law does not attempt to define any method of controlling refractory pupils, it declares that the punishment inflicted shall be moderate. Certainly the punishment here inflicted can not be so regarded. Nor can the proposition be maintained that a teacher has a right to whip a pupil as long as he appears unsubdued. In controlling the pupil he can not exceed the limit fixed by the statute, which is that the correction must be moderate, and a punishment may greatly exceed this limit without subduing the spirit or endurance of the pupil upon whom it is inflicted. The facts of the case justify the verdict of the jury, and it is affirmed."

[The practice of whipping pupils has come down to us as one of the barbarisms of the past. If a pupil persist in disobeying rules of decorum and discipline he should be dismissed from the school.—Ed.]

STATE v. CODY.

(94 Iowa, 169.)

ASSAULT: *Instructions—Verdict.*

1. The refusal of an instruction which is fully covered by the instructions given, is not ground for reversal.
2. An acquittal of assault with intent to inflict great bodily injury, by a finding of guilty of an assault only, is not, in legal effect, an acquittal of the lower degree of simple assault, on the ground that it is a practical finding that the blow admitted to have been struck was not unlawful, and a battery, and hence that there could have been no assault under the admitted facts.
3. Instructions defining an assault as "an unlawful attempt to commit violence upon the person of another, with the present ability to do so," and defining a battery as "an unlawful beating of another," is not rendered erroneous by the use of the words "unlawful attempt," and the omission of the words "with full force or violence."

Appeal from District Court, Tama County; J. R. Caldwell, Judge.

Indictment. Verdict of guilty, and the defendant appealed. Affirmed.

W. H. Stivers, for appellant.

Milton Remley, Attorney-General, and *Thos. A. Cheshire*, for the State.

GRANGER, J. 1. The indictment is for an assault with intent to inflict great bodily injury. The verdict is for an assault. The particulars of the offense, as charged, are that the defendant "did make an assault on one Lorenzen, and did hit, bruise, and inflict certain sore and grievous wounds upon the head of the said Lorenzen, with intent," etc. The court instructed the jury as to the offense charged, and also as to an assault and battery and an assault. The circumstances of the offense charged are, in brief, that the defendant, Lorenzen, one Skinner, and others, were in a saloon, where there was a controversy on politics, when, as claimed by defendant, Lorenzen and others made an assault on Skinner, and were about to inflict on him serious injuries, when he took up the chair and struck the blow complained of in defense of Skinner. The defendant asked an instruction to the effect that if the blow was struck by defendant in necessary defense of Skinner, when he was being beaten by Lorenzen and others, and was in danger of bodily harm, and that defendant had no other purpose in striking the blow than to prevent the injury, and used no more force than was necessary for that purpose, then the defendant was not guilty. The correctness of the instruction asked is not questioned, but we think the same legal thought is presented in a single instruction given by the court, and, together, the instructions given elaborate the thought, and give it quite especial prominence.

2. The evidence conclusively shows that the defendant struck Lorenzen with a chair. Defendant was a witness, and so said. It is urged that, by the verdict for an assault only, there is a practical finding that the blow struck was not unlawful, and hence, as the blow was lawful, the assault leading to the blow could not have been unlawful. Appellant cites a line of cases to support the rule; and speaks of *State v. Sigg*, 86 Iowa, 746, 53 N. W. 261, as decisive of the question. That was an indictment for rape, and the court did not instruct as

to an assault, and the verdict was for an assault with intent to commit rape. The action of the court is sustained, and it is there said: "While there was evidence of an assault, there was none from which an assault could be found without finding a battery also."

Another case much relied on is *State v. Mahan*, 68 Iowa, 304, 20 N. W. 449, and 27 N. W. 249. The indictment was for murder in the first degree, and the verdict was for manslaughter. Complaint was made that the court did not instruct as to degrees lower than manslaughter, but told the jury that if the defendant was not guilty of murder or manslaughter it must acquit. It was admitted that the defendant inflicted the wound that resulted in the death, and unless the blow was struck in self-defense, beyond any peradventure, there was a criminal homicide. These cases fairly illustrate the line of authorities cited. The holdings are, that in cases where it so conclusively appears that, if there is any crime, it is one of the higher degrees included in that charged in the indictment, it is not error to refuse to charge as to the lower degrees; and although some language, argumentatively used, may seem to express a broader rule, when limited, as it should be, by the subject-matter, it does not. An instruction so given only takes from the jury a right to convict of a lower degree of the crime charged, that may have fuller support in the evidence, because the evidence that warrants a conviction of such lower degree, just as conclusively warrants a conviction of the higher degree. Now, a defendant has no just grounds of complaint if the court, in such a case, shall limit the action of the jury to a conviction of the higher degree or an acquittal. But we think it can not be said to be error, prejudicial to the defendant, if, in such a case, the court should permit the jury to find as to the lower degree, if the testimony sustains the finding, which, of course, it must do to sustain a finding in the higher degree. It amounts to simply this: A defendant who has committed an offense of a higher or the highest degree charged, is convicted of a lower degree of which he is guilty. By such a course he is not prejudiced. It is, however, said that the verdict of an assault is a practical finding that there was not a battery, and if not, in view of the admitted facts, there was no assault. But the jury found that there was an assault, though not a battery. The district court, as well as this

court, thinks the finding is sustained by the evidence, and this court would have sustained a finding of an assault and battery.

Of course, the verdict concludes the case as to the degree of assault and battery, but we know of no rule to warrant us in disturbing a verdict of a degree of the offense charged, that has support, merely because we can not account for a failure to find a verdict for a higher degree. Under an instruction given as to a conviction only of that degree of which there was no reasonable doubt, the action of the jury may be accounted for, so far as we are required to notice that fact. In some of the cases, where the effect of the evidence is, as we have indicated, to establish the higher degree of the offense as conclusively as it does the lower, substantially such language as this is used: "Under the evidence, the defendant is guilty of a higher degree or nothing." It is sought to attach to this language a legal inference that an acquittal of the higher degree is an acquittal of the lower degree. Such a conclusion is not a necessary inference from the language. We see no reason why the negative or inferential finding as to the higher degree should, as matter of law, override the affirmative or actual finding as to the lower degree. As a logical or rational proposition, the affirmative finding as to the lower degree, in such a case, would convict of the higher degree. Such could not, of course, be a legal result. The language of the cases referred to, is correct as indicating that there is as conclusively actual guilt of one degree of the offense as of the other, but its legal effect is not to hold that, when the jury shall acquit of the higher degree by a finding of guilt as to the lower, there should be an acquittal as to both, if the verdict actually returned has support in the evidence.

3. The court in one instruction defined an assault as "an unlawful attempt to commit violence upon the person of another, with the present ability to do so." In another instruction the court said: "A battery is an unlawful beating of another. Every battery includes an assault." The complaint is of the words "unlawful attempt," and leaving out the words "with full force or violence." In the first definition the element of violence is clearly indicated. We think the definition in either case is sufficiently accurate. In Bishop's New Criminal Law (volume 1, § 548), it is said: "A battery

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is an unlawful beating, or other physical violence or constraint, inflicted upon a human being without his consent. * * * An assault is included in every battery." This language clearly indicates that an unlawful beating is a wrongful physical violence. Some other points are touched upon in argument, but no error is shown. The judgment is affirmed.

KINNE, J., took no part in this case.

NOTE.—Power to punish.—St. 1893, c. 396, § 36, provides that the offense of assault and battery, tried in a police or district court, is punishable by imprisonment in the jail or the house of correction for a term not exceeding one year, or by a fine not exceeding \$100. Pub. St., c. 215, Sec. 1 (St. 1782, c. 9, Sec. 1), provides that in cases of legal conviction, where no punishment is provided by statute, the superior court shall award a sentence according to the nature of the offense, and not repugnant to the constitution; but there is no statute which in terms defines what the punishment for an assault shall be where the case is tried in the superior court. *Held*, that the superior court has power to sentence a person convicted therein of an assault to confinement in the house of correction at hard labor for the term of three years. *O'Neil v. Com.*, 165 Mass. 446.

Right to assess fine.—One section of the Code of Alabama, provides that the jury shall fix the amount of a fine, and another section provides that when an offense may be punished, in addition to a fine, by imprisonment, the jury shall not be required to impose a fine if, in their judgment, defendant should be punished in some other mode, but may only find him guilty, and leave the punishment to the court. *Held*, that where a jury finds defendant guilty, without assessing a fine, the court can not impose a fine. *Spicer v. State*, 105 Ala. 123.

Grade of offense.—Submitting question to jury.—It is not error, in a criminal prosecution, to submit to the jury the question of the defendant's guilt of a higher grade of offense than that for which the conviction is had, provided there is evidence to sustain such charge, although it is possible, or even probable, that a verdict therefor, had one been rendered, would have been set aside as unsupported by the evidence. *Whitner v. State*, 46 Neb. 144.

In the absence of the evidence from the record, it must be assumed that it was sufficient to sustain the verdict of the jury, and that it warranted the giving of an instruction upon an offense included within that charged in the information. *State v. Kendall*, 56 Kas. 238.

Assault—Rescuing cattle wrongfully taken.—In the absence of proof of a statute authorizing it, one has no right to shut up trespassing stock owned by another; and, if he does so, the owner or members of his family may rightfully enter and release it, and forcible resistance to such release will constitute an assault. *Cox v. State*, 34 S. W. 754.

[If this pronouncement of the Texas court of criminal appeals should be followed to its logical conclusion in all cases applicable, we would soon be able to dispense with courts and legislative assemblies, and every man powerful enough would redress his own real or imaginary wrongs.—Ed.]

STATE V. GLEIM.

(17 Mont. 17.)

ASSAULT WITH INTENT TO MURDER: *Indictment against accessory—Evidence—Instructions—Examination of witness—Competency of juror.*

1. Though the distinctions between accessories before the fact and principals are abolished, an indictment first setting out the guilt of the principal offender, and then charging that, "before the commission of said felony, defendant did" "counsel, aid, incite, and procure" said principal to commit the felony, is unobjectionable.
2. On the trial of one who, at common law, would have been an accessory before the fact, the record of conviction of the principal is *prima facie* evidence of the latter's guilt.
3. Where one of defendant's attorneys, before testifying for the defense, did not ask permission to argue the case, as required by a rule of court, it was not error to refuse to permit him to do so.
4. A charge that the law did not require the jury to be satisfied beyond a reasonable doubt of each link of the chain of circumstances, relied upon to establish defendant's guilt—that it was sufficient if, taking all the testimony together, the jury was satisfied beyond a reasonable doubt of defendant's guilt—was erroneous, as it was necessary for the state to prove beyond a reasonable doubt each fact and circumstance necessary to complete the chain.
5. The jury being the sole judges of the weight of the evidence, it was error to charge that defendant's voluntary admissions, proved by competent testimony, were entitled to great weight.
6. The prosecution has no right to examine defendant so as to elicit testimony reflecting on her moral character, where it was not proper cross-examination, and did not legitimately tend to impair her credibility.
7. A juror who has formed a fixed opinion as to the guilt or innocence of the principal offender, ought not to sit on the trial of the person charged as an accessory.
8. It was proper to refuse to permit a witness to be asked, for the purpose of affecting her credibility, whether she was addicted to the morphine habit, unless it was intended to show that she was under the influence of the drug at the time the events happened about which she was testifying, or that her powers of recollection were impaired thereby.
9. An instruction defining moral certainty, should state that the juror must be so convinced by the evidence of the truth of the fact, that he himself would venture to act upon such conviction in matters of the highest concern and importance to his own interests.

Appeal from Fourth Judicial District Court, Missoula County; F. H. Woody, Judge.

Mary Gleim was convicted of assault with intent to commit murder, and appeals. Reversed.

Toole & Wallace, for appellant.

H. J. Haskell, Attorney-General, and *Thos. C. Marshall*, for the State, respondent.

HUNT, J. Patrick Mason, Mary Gleim, and William Reed were jointly indicted for an assault, with intent to commit murder, upon one Burns. Appellant, Mary Gleim, was separately tried after Mason had been convicted. She was found guilty, and sentenced to the penitentiary for fourteen years.

1. Appellant contends that the indictment will not support a verdict and judgment of guilty, "because it nowhere charges that said Mary Gleim committed the crime of assault with intent to murder."

The material charging parts of the indictment are as follows: "That one Patrick Mason, late of the county of Missoula, state of Montana, on or about the 13th day of February, A. D. 1894, at the county of Missoula, in the state of Montana, did feloniously, deliberately, premeditatedly, and of his malice aforethought, make an assault in and upon one C. P. Burns, and certain giant powder and other highly explosive substance, a more particular description of which is to said jurors unknown, in, upon, around, and under the house where the said C. P. Burns was then and there present and sleeping, did feloniously, deliberately, premeditatedly, and of his malice aforethought, put and lay, and the same did then and there, feloniously, deliberately, premeditatedly, and of his malice aforethought, explode, and cause to be exploded, with intent in him, the said Patrick Mason, to kill and murder the said C. P. Burns. And that before the commission of the said felony, at the time and place aforesaid, one Mary Gleim and William Reed did feloniously counsel, aid, incite, and procure the said Patrick Mason to commit, in manner and form aforesaid, the said felony. All of which is contrary to the form of the statute," etc.

The indictment is substantially a common law charge against Mason as principal and Mary Gleim as an accessory before the fact. It follows the precedents of Wharton (1 Whart. Prec. Ind., § 97) and of Archbold (Archb. Cr. Prac. & Pl. pp. 67, 77). Bishop on Criminal Procedure (Volume 2, § 8), quoting Chitty on Criminal Law, lays down the course to be, first, to state the guilt of the principal, as if he alone had

been concerned; and then, in case of accessories before the fact, to aver that the procurer, "before the committing of the said felony, in form aforesaid, to wit, on, etc., with force and arms, etc., did maliciously and feloniously incite, move, procure aid, and abet (or counsel, hire, and command) the said principal felon to do and commit the said felony, in manner aforesaid, against the peace," etc.

The statutes (sections 176, 177, Cr. Prac. Act 1887) provide:

"Sec. 176. Any person who counsels, aids or abets in the commission of any offense, may be charged, tried and convicted in the same manner as if he were a principal.

"Sec. 177. An accessory before the fact, to the commission of a felony, may be indicted, tried and punished; though the principal be neither indicted nor tried."

By section 12, c. 2, p. 502, Comp. St., 1887, it is provided: "Any person who stands by, and aids, abets or assists, or who, not being present, hath advised and encouraged the commission of a crime, shall be deemed a principal offender, and shall be punished accordingly."

It is plain that the old distinctions between accessories before the fact and principals are abolished by these statutes (*State v. King*, 9 Mont. 445, 24 Pac. 265); but we see no objection to the form of an information charging a person as an accessory rather than as a principal. To so charge is to the advantage of a defendant, because it notifies him of the attitude which the state will assume when the case is brought to trial, by setting out the facts constituting the offense with greater certainty than is requisite where an accessory is indicted as a principal.

This point was directly raised in *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36, where the court held that an information stating facts sufficient to constitute a defendant an accessory at common law charges him with guilt as a principal under the statutes, and that to allege such facts as would have been sufficient against him as an accessory at common law, is charging him as a principal under the statute. We are of opinion that the rights of the defendant were not prejudiced by the form of the charge. *State v. Littell* (La.), 12 South. 750; *Territory v. Guthrie*, 2 Idaho, 398.

2. On the trial of the appellant, Gleim, the court, over the

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objection of the defendant, permitted the record of the conviction of Mason, the principal actor, to be introduced, and after having fully instructed the jury that it was essential, in order to convict the defendant, Gleim, that they should find that Mason was guilty of having committed the crime charged, instructed as follows: "That the record of the trial and conviction of Patrick Mason was introduced in the trial of this case, for the purpose of establishing as a fact, *prima facie*, the guilt of said Mason. The record is *prima facie* evidence of the guilt of said Mason, but it is not conclusive evidence. It, however, remains *prima facie* evidence of the fact which it was introduced to prove, unless you believe from the evidence in this case that the defendant, Mary Gleim, has introduced evidence in this case which raises in your minds a reasonable doubt (as explained in these instructions) of the guilt of said Mason; but, if such testimony raises in your minds such reasonable doubt of the guilt of Mason, then you should find the defendant Gleim not guilty. But, unless the evidence introduced by the defendant Gleim does raise in your minds a reasonable doubt (as explained in these instructions) of the guilt of the said defendant Mason, you should receive such record of trial and conviction as evidence establishing the guilt of said Patrick James Mason. But, in determining the question of the guilt or innocence of the said Patrick James Mason, you are not confined to the record of trial and conviction introduced in this case, but you should carefully consider all of the evidence introduced in this case tending to prove or disprove the guilt of said Mason; and after a full and careful consideration of all the evidence in the case, in connection with the record in evidence, you have a reasonable doubt of the defendant Mason's guilt, you should find the defendant Gleim not guilty."

While it is true that the statute makes an accessory before the fact a principal, yet the evidentiary facts by which the accessory is to be incriminated may materially differ from those which are necessary and sufficient to convict the principal. In this case, for instance, to incriminate the appellant, Gleim, at all, under the theory of the state, as charged and contended for, it was not only necessary to prove the guilt of Mason, as alleged, but to go further, and to demonstrate beyond a reasonable doubt that the appellant, Gleim, counseled, aided, and abetted Mason in the perpetration of the crime

charged. Therefore, although the accessory might be deemed a principal under the statute, and was indicted with the principal, it became impossible for the state to convict appellant upon the same evidence applicable to the principal, because the agency of the accessory in the perpetration of the crime charged, operated by a radically different method from the principal's. The statute, in simplifying the procedure, has obliterated old distinctions between principals and accessories, but the object of the simplification is largely to enable a guilty accessory to be punished without making his guilt depend upon the conviction of the principal. The facts, however, that the principal offense was committed, and that the principal who was charged to have committed it was guilty, were among the essential elements upon which must be predicated the guilt of the accessory Gleim. And right here is to be observed an important distinction between proof of a charge against a principal, and an accessory made principal by the statute alone (but indicted with the principal, as in the case), and proof of a charge against several persons, ordinarily jointly indicted as simple co-defendants, and who are in fact principals. In the one instance, the accessory before the fact being confessedly absent at the time of the commission of the principal offense, there can be no conviction without proof of the guilt of the principal; while, in the other case, whether or not any defendant other than the one on trial participated in the criminal act is immaterial, and forms no essential part of the case against the defendant on trial. Where, therefore, as in this case, the guilt of the principal must be proved as part of the case against the accessory, we can not think that it is necessary for the state, where the principal has been convicted, to do more on its *prima facie* case than to offer the record of conviction of the principal as *prima facie* evidence of his guilt of the crime charged against him. We do not think that the fact that the principal has been convicted, is proof of the guilt of the accessory. But it does make out a *prima facie* case of the principal's guilt, and unless rebutted by evidence of the accessory, as it may be, is competent to prove that material element of the crime charged against the accessory, and upon the truth of which must depend the guilt of the accessory; namely, the commission of the crime of the principal, for which she is held responsible in law, provided she procured or aided and abetted

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the principal to commit the same. Although there are some cases holding a contrary view, we are satisfied with the reasoning of the authorities which permit the introduction of the record of the conviction of the principal. (*Maybee v. Avery*, 18 Johns. 352; *People v. Buckland*, 13 Wend. 593; *Levy v. People*, 80 N. Y. 327; *State v. Mosley*, 31 Kan. 355; 2 Pac. 782; *Com. v. Knapp*, 10 Pick. 477; Abb. Trial Brief (Cr.), § 624; *Anderson v. State*, 63 Ga. 675; Rosc. Cr. Ev., p. 171; 1 Russ. Crimes, p. 67; Archb. Cr. Prac. & Pl., p. 83; *Com. v. York*, 9 Metc. (Mass.) 93; *Studsill v. State*, 7 Ga. 2).

3. Joseph K. Wood, Esq., of counsel for appellant, was a witness in defendant's behalf upon the trial. He desired to participate in the argument for the defense. The court refused to permit him to do so, under a rule of court which provides that if the attorney of either party offers himself as a witness in behalf of his client, and gives evidence on the merits of the trial, he shall not argue the case or sum it up to the jury, unless by permission of the court. It does not appear by the record that, before the counsel testified, he explained to the court his position, and asked permission to argue the case. Under the circumstances, we can not think that the enforcement of the rule was erroneous or even harsh.

4. The defendant asked the court to instruct the jury upon the law of circumstantial evidence, as follows: "The testimony in this case is wholly circumstantial. And while it is not necessary, in order to warrant a conviction on a criminal charge, for the state to prove the commission of the act by an eye witness or by direct testimony, and while the guilt of the defendant may be established by circumstantial evidence, still, in order to support a conviction upon circumstantial evidence alone, each fact and circumstance necessary to complete the chain to fasten the guilt upon the defendant must itself be distinctly and independently proven by competent evidence beyond a reasonable doubt; and all the facts and circumstances, when so proven, must not only be sufficient in themselves to satisfy the mind of the guilt of the accused beyond a reasonable doubt, but they must exclude every other reasonable supposition except that of his guilt."

The court modified the instruction offered, and gave another upon the subject of circumstantial evidence, so that the jury were instructed as follows: "The testimony in this case is

wholly circumstantial. And while it is not necessary, in order to warrant a conviction on a criminal charge, for the state to prove the commission of the act by eyewitnesses or direct testimony, and while the guilt of the defendant may be established by circumstantial evidence, still, in order to support a conviction upon circumstantial evidence alone, each fact and circumstance necessary to complete the chain to fasten the guilt upon the defendant must itself be independently proven by competent evidence; and all the facts and circumstances, when so proven, must not only be sufficient in themselves to satisfy the mind of the guilt of the accused beyond a reasonable doubt, but they must exclude every other reasonable supposition except that of his guilt."

"That the law requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt in order to warrant a conviction does not require that you should be satisfied beyond a reasonable doubt of each link of the chain of circumstances relied upon to establish the defendant's guilt; it is sufficient if, taking all of the testimony together, you are satisfied beyond a reasonable doubt that the defendant is guilty."

The charge that, in order to warrant a conviction, the jury must not be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt, but that it is sufficient if, taking all the testimony together, they are satisfied beyond a reasonable doubt that the defendant is guilty, is erroneous and prejudicial to the rights of the defendant. This identical instruction was reviewed by the supreme court of Colorado in the recent and somewhat celebrated Dr. Graves murder case (*Graves v. People*, 32 Pac. 63). The court there condemn the instruction upon principle, as tending to confuse a jury, and well express our views by saying that "the jury are quite as likely to have applied that portion of the instruction referring to the links to those facts which the law requires to be established beyond a reasonable doubt to warrant conviction as to those evidentiary matters which go to prove such facts, and one or more of which may fail, while the ultimate fact might still be sufficiently established."

An Illinois case (*Bressler v. People*, 117 Ill. 422, 8 N. E. 62), has approved of the instructions here complained of, but the reasoning supporting the conclusion of the court is not sound.

"It involves," says Thompson on Trials (volume 2, § 2514), "the solecism that, although the circumstances do arrange themselves in the form of the links of a chain, yet that, when one link of the chain is broken, the chain itself may still remain entire; ignoring the obvious conception that no chain can be stronger than its weakest link." The authorities disapproving of these instructions are collected in the Colorado decision to which we have referred. We believe it to be correct that the prosecution need not prove beyond a reasonable doubt every circumstance offered in evidence which tends to establish the ultimate circumstances or facts on which it relies for a conviction, but if the metaphor of a chain is used, and each circumstance relied upon forms a link, the link becomes a necessary part of the whole chain, and must therefore be proved beyond a reasonable doubt.

The cable metaphor, as approved by the Colorado supreme court in *Clare v. People*, 9 Colo. 122 (10 Pac. 799), illustrates the force of circumstantial evidence more clearly, perhaps, than does the chain comparison. In the cable simile the circumstances which tend to establish the ultimate circumstances or facts are aptly compared with the strands of a cable. All such evidentiary matters going to prove such ultimate circumstances or facts need not be established beyond a reasonable doubt, and still each ultimate fact or circumstance must be proved beyond a reasonable doubt; just as a few strands of the cable may part, and yet it still remains so strong "that there is scarcely a possibility of its breaking." We, therefore, think that, if the chain metaphor is to be used, the instruction, as offered, correctly stated the law, and that it is necessary for the state to prove each fact and circumstance necessary to complete the chain, * * * by competent evidence, beyond a reasonable doubt, etc., and that it was reversible error to charge to the contrary. *Territory v. McAndrews*, 3 Mont. 158.

There are other errors complained of by the appellant. The respondent contends that they are not properly before us for review, but, as the case must be tried again, we will briefly refer to them.

First. Error is assigned upon the following instruction: "That parol evidence of the verbal admissions of a defendant may be evidence of a most satisfactory character. If the jury

can see, from the evidence, that the alleged admissions of the crime charged in the indictment were clearly and understandingly made by the defendant, and that they were precisely identified, and the language correctly and accurately repeated by the witness, then such testimony is entitled to great weight." It was error in the court to instruct the jury that testimony of admissions of defendant was entitled to great weight. The jury being the sole judges of the weight to be given to the testimony, the court should not tell them what particular weight to give to any portion of the testimony. *State v. Sullivan*, 9 Mont. 174 (22 Pac. 1088); 2 Thomp. Trials, § 2287.

Second. Upon the trial the counsel for the state, on the cross-examination of the appellant, propounded a great many questions calculated to degrade the defendant before the jury. The inquiry took a wide and varied range. She was asked if she had not rented houses for purposes of prostitution at various places in Montana; whether she had not been "a kind of a backer for the prostitution of female persons in Missoula and Hamilton;" whether she had not had a fight with a priest; whether she had not hugged and kissed a jurymen after she had been found not guilty of some misdemeanour upon one occasion; whether she had not had a fight with a French prostitute at some time; and whether, at another time, she had not "run a young gentleman through a saloon;" whether she had not been drunk when she was in jail; and, finally, if her picture did not hang in the Rogue's Gallery in the city of New York.

We can not conceive upon what theory of the law this line of testimony was allowed. It was not cross-examination of what appears by the record to have been the appellant's evidence in chief, nor did it legitimately tend to impair the credibility of the defendant as a witness. Its effect must have been highly injurious and prejudicial to the defendant in the minds of the jury. Most of the matters involved in the questions were wholly remote from the question of her guilt or innocence of the crime for which she was on trial, and the investigation seems to have drifted to a rambling assault upon the general character of the defendant, extending not only to all of the offenses with which she may have ever been at any time charged, or even suspected, whether rightfully or not, but likewise to cases where she was acquitted, and to her

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infirmities of habit, her obscenity of speech, and general depravity of life. Such an examination we most earnestly disapprove. It was oppressive and unjust, no matter how wicked or degraded the defendant may have been by common report. We find a well-considered decision, censuring such an examination of a defendant, in the recent case of *People v. Un Dong* (Cal.), 39 Pac. 12.

Third. It does not appear whether or not any of the jurors who sat upon the trial of this case had stated upon their *voir dire* that they had fixed opinions as to the guilt of Patrick Mason, the principal, but the appellant's counsel implies that they did, and argues the point in his brief. A juror who has formed a fixed opinion as to the guilt or innocence of the person charged to be the principal offender ought not to sit upon the trial of the person charged as an accessory. *Arnold v. State*, 9 Tex. App. 435.

Fourth. We see no error in refusing to permit a witness to be asked, on cross-examination, for the purpose of affecting her credibility, whether or not she is addicted to the morphine habit (*State v. White*, 8 Wash. 230, 39 Pac. 160), unless it is proposed to show that the witness was under the influence of the drug at the time the events happened about which she testified, or unless she is under the influence of morphine at the time she is testifying, or unless it is made to appear that her powers of recollection are impaired by the habitual or excessive use of the drug.

Fifth. The court defined a reasonable doubt in substantially the exact language of the Webster case, 5 Cush. 320, and which was expressly approved of in *Territory v. McAndrews*, 3 Mont. 158. As part of the definition, however, of a moral certainty, the court charged that "moral certainty may be said to bear the same relation to matters relating to human conduct that absolute certainty does to mathematical subjects. It is a state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it. It is not only what men in general will unhesitatingly believe to be true, but what they will be willing to act upon." If the definition of moral certainty is to be given at all, "to be thoroughly impressive it should be carried one step further. * * * Is the juror so convinced by the evidence of the truth of the fact sought to be proved,

that he himself would venture to act upon such conviction in matters of the highest concern and importance to his own interests? If this be so, he may declare himself morally certain." *Territory v. McAndrews, supra.*

The condition of the record in this case is faulty. The transcript recites that the instructions given by the court are as follows. Then follow what, doubtless, were the instructions read to the jury. At the conclusion of many such instructions, however, we find the word "Given," and, at the conclusion of others, "Given as modified," without specifying what the instruction given was.

The error of the court in charging, as it did, upon circumstantial evidence, is properly presented, and upon that point the case is reversed, and a new trial ordered.

Reversed and remanded.

PEMBERTON, C. J., and DE WITT, J., concur.

NOTE.—*Sufficiency of indictment.*—An indictment charged that defendants, "in and upon one K., did then and there unlawfully, feloniously, purposely, and with premeditated malice, make an assault, and him, the said W. K., did then and there at and against the said W. K., did feloniously, purposely, and with premeditated malice shoot a certain pistol and revolver then and there loaded with gunpowder and leaden balls; which they, the said" defendants, "then and there in both their hands had and held, with intent then and there and thereby, him, the said W. K., feloniously, purposely, and with premeditated malice to kill and murder, contrary to the form of the statute," etc. Held, that the indictment was sufficient to charge defendants with assault with intent to murder, as against a motion in arrest of judgment. *Ellis v. State*, 141 Ind. 357; *State v. Lynch*, 88 Me. 385.

Under Cr. Code, Sec. 123, requiring a brief general description to be given of an offense charged, an indictment for "willfully" and maliciously cutting "another" with a knife with intention to kill (St. Sec. 1166), which merely charges the crime as "malicious cutting with intent to kill," is not fatally defective in that it omits the words "willfully" and "another," where the statement of the acts constituting the offense shows that the subject of the cutting was a human being, and that it was done willfully, etc. *Gratz v. Com.*, 96 Ky. 162.

Objection on the ground that the offense charged in an indictment or information differs from that named in the complaint upon which the accused was held to answer, should be made by plea in abatement, and not by motion to quash. *Whitne v. State*, 46 Neb. 144.

It is sufficient if the words used in an indictment to charge the commission of a statutory offense are more than the equivalent of the words of the statute, provided they include the full significations of the statutory words. *State v. Lynch*, 88 Me. 385.

Under an indictment under Act 44 of 1890, which alleges a club as the

dangerous weapon used, proof that a pistol was so employed will not sustain a conviction. *State v. Braxton et al.*, 47 La. Ann. 158.

The exact words of a statute defining a crime need not be used in the indictment or information charging it, but words fairly importing the same idea are sufficient. *Chandler v. State*, 141 Ind. 106.

Time when.—It is sufficient that an indictment shows that the crime was committed before the indictment was found, without specifically stating such fact. *Gratz v. Com.*, 96 Ky. 162.

YARBROUGH v. STATE.

(105 Ala. 43.)

ASSAULT WITH INTENT TO MURDER: *Impaneling of jury—Witness—Evidence of Credibility—Insanity—Opinion Evidence—Degree of Proof—Instructions.*

1. After the jury is completed, but before the indictment is read to them, if a juror states that he is sick and can not proceed with the trial, the court may excuse him and complete the jury from the venire men, or, if the venire is exhausted, summon a qualified juror from the body of the county.
2. Testimony that witness saw defendant after his arrest, and recognized him as the one whom he saw commit the offense, is admissible.
3. On trial for assault with intent to murder, where it appeared that the prosecution was not begun for several months after the commission of the offense, and the one assaulted testified that he began it immediately after being informed by one who was a witness on the trial, that she heard defendant and another, on the night of the assault, conspiring to rob him, evidence obtained on cross-examination of such witness that a short time prior to giving such information, she had been arrested on a criminal charge preferred by defendant, is admissible to impair the credibility of her testimony in regard to the conspiracy.
4. To rebut such evidence, testimony that witness had given the same information to the prosecuting witness before her arrest, on the charge preferred by defendant, is admissible.
5. A non-expert witness, who has known a person familiarly for a long time, may testify that such person is sane, but can not give an opinion as to his sanity without stating the facts on which the opinion is based.
6. A defendant jointly indicted with another is not entitled to a joint trial where it appears that the other had not been arrested when defendant was put on trial, and that the request for a joint trial was not made until after the organization of the jury was begun.
7. Evidence of the general bad character of a witness is admissible, in addition to evidence of bad reputation for truth and veracity, to discredit his testimony.
8. Evidence of the good character of a witness several years before the trial,

and while living in a community other than that in which witnesses testified that she had a bad character, is admissible to rebut such testimony.

9. A charge that "every single fact or charge against defendant tending to prove his guilt should be clearly and satisfactorily proven, or else the defendant must be acquitted," was properly refused.
10. A charge that defendant should be acquitted if "any uncertainty whatever" exists as to his guilt was properly refused.
11. On a trial under two counts, one charging assault with intent to murder and the other assault with intent to rob, it was proper to refuse to charge that, though defendant should be found guilty of an assault with intent to rob, he must be acquitted if not found guilty of assault with intent to murder.
12. A charge that "a reasonable doubt is one that excludes every reasonable hypothesis except that of the guilt of the defendant, and only when no other supposition will reasonably account for all the conditions of the case can the conclusion of guilt be legitimately adopted," was properly refused as misleading.
13. Counsel should not be allowed to read to the jury from legal text-books.

Appeal from Criminal Court, Jefferson County; Hon. S. E. Greene, Judge.

Ed. Yarbrough was convicted of assault with intent to murder, and appeals. Affirmed.

After the organization of the jury, but before the indictment was read to them, one of the jurors stated to the court that he was sick, and could not possibly sit on the jury, and asked to be excused. Upon examination by the court the juror stated the cause of his suffering, and the court excused him, against the objection and exception of the defendant. In obedience to the order of the court, the bailiff summoned another juror on the venire of the week, named Brown, whom the defendant challenged. The court then ordered the bailiff to summon one Lawler, the only remaining juror who had not been challenged by the State or the defendant, "and who, the jury having been completed, was excused, until the next morning." The defendant objected to the court's making said order, and duly excepted to the court's overruling his objection. Defendant, in the selection of the jury, having challenged nine jurors, the court refused to allow him to challenge Lawler, and the defendant excepted. After the State examined several of its witnesses, the court adjourned until the next morning. On the court reconvening, the juror Lawler stated that he was sick, and unable to proceed with

the trial of the cause, and asked to be excused. Upon stating the nature of his sickness the court excused the juror, and the defendant excepted. The court thereupon, over defendant's exception, ordered the bailiff to summon a qualified juror to take the place of said Lawler. The entire venire for the week having been exhausted, the bailiff summoned one J. G. Benton, and, after examining him as to his qualifications, the court pronounced him competent. The defendant claimed the right to challenge the said juror, but the court refused to allow the defendant to challenge, he having already challenged nine jurors, and the defendant excepted. The defendant then objected to going to trial before the jury as organized, "because said jury was not summoned, impaneled, and sworn as required by law." The court overruled this objection, and the defendant excepted. The defendant then moved the court to be discharged, on the ground that he had already been placed in jeopardy, and duly excepted to the court's overruling his motion. The defendant then filed a plea of former jeopardy, and a plea of former acquittal, setting out the facts as stated above. To these pleas the State demurred, and, upon the court's sustaining the demurrer to each of said pleas, the defendant separately excepted.

The state introduced one J. B. Cole as a witness, who testified, in substance, that some time between the first and fifteenth of February 1891, the defendant and a tall black man, whom he did not know, came into his store, in the suburbs of the city of Birmingham, about eight o'clock at night, where he and his daughter, a girl twelve years old, were sitting by the stove; that as the witness started behind the counter, and asked the defendant and his companion what they wanted, they each drew their pistols, and said that they wanted money; that, as the witness dodged under the counter, the defendant fired at him, his head, before he dodged, being directly in the range of the ball; that the other man fired into the ceiling, over the head of the defendant, and did not fire at the witness at all. The witness identified the defendant as the man, and further testified, in answer to the question of the state, "that he saw the defendant the next morning pass right by his store," walking within a few feet of the witness. The defendant objected to the question eliciting this statement, on the ground that it was irrelevant and immaterial, and also

moved the court to exclude the answer of the witness upon the same ground. The court overruled the objection and motion, and the defendant separately excepted to each ruling. The defendant's counsel asked the witness "if it was not a fact that he had taken no steps to have defendant arrested until after Polly Foster told him that she had heard the defendant and two other men, on the night of the assault, conspiring to rob him; and if Polly did not make this statement a day or two before defendant's arrest, and a day or two after her conviction by a justice of the peace, for an assault on Beverly Hargrove's sister, Beverly Hargrove being the complainant in that prosecution and a co-defendant in this." The witness answered that such was a fact. On re-direct examination by the state, this witness was asked in rebuttal "if Polly Foster had not, previous to the time immediately preceding the defendant's arrest, told him, in another conversation, of this conspiracy between the defendant and Beverly Hargrove to rob him." The defendant objected to this question on the ground that it called for illegal and irrelevant testimony. The court overruled the objection, and defendant excepted. Upon the witness answering that "Polly Foster had spoken to him several times about the alleged conspiracy, the first time being as much as six or eight months before defendant's arrest," the defendant moved to exclude the answer, and duly excepted to the court's overruling his motion. Polly Foster, a witness for the state, testified that in the fall of the year, about 8 o'clock on the night Cole was assaulted, she heard defendant and another man conspiring to rob Mr. Cole, and that shortly after she heard four pistol shots. A witness for the state testified that he knew Polly Foster, and knew her general character in the community where she lived, and that it was bad, "and stated a number of things tending to show her mental unsoundness, and stated, as his opinion, that Polly Foster was of unsound mind."

Several witnesses for the defendant testified that, in their opinion, Polly Foster was of unsound mind. The defendant offered to read in evidence to the jury from "Wills on Circumstantial Evidence," a legal text-book; but, upon the state's objection, the court refused to allow the defendant to read from said book, and the defendant thereupon excepted. The state introduced, in rebuttal, one Z. T. Hurst, who testified that

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he knew Polly Foster, and, upon being asked if he knew her general character, he said that he did not know her general character in Birmingham, "but he knew her character in Gadsden, Alabama, ten or twelve years ago, and that it was good at that time; and that he had known her for sixteen years." The defendant moved to exclude this testimony of the witness, and duly excepted to the court's overruling his motion. The witness further testified that he saw Polly Foster for about two years once every week; that, during that time she washed for him, and he had frequent conversations with her. The court then asked the witness "what was his opinion as to her mental soundness or unsoundness at that time." The defendant objected to this question upon the ground that the witness was not shown to be an expert, and did not show sufficient familiarity with the witness Foster's condition to express an opinion. The court overruled the defendant's objection; defendant excepted; and the witness answered, "I think she was weak-minded." Pat Walsh, as a witness for the state, in rebuttal testified "that he had known Polly Foster for sixteen or seventeen years, and that he saw her frequently in Gadsden, for a space of two years, about nine years ago, and that she was employed in his family for several months as a cook, and he had frequent conversations with her, and that he had known her in Birmingham for seven years, and that she had lived in his family here for four years." The state then asked this witness, "What is your opinion as to her mental condition?" The defendant objected to this question, on the ground that the witness was not qualified. The court overruled the objection and defendant excepted. On the witness answering that he considered her of sound mind, the defendant moved to exclude his answer, and excepted to the court's overruling his motion.

The defendant requested the court to give the following written charges, and duly excepted to the court's refusal to give each of them: (1) "If the jury believe the evidence they will find the defendant not guilty." (2) "If the jury believe from the evidence that one of the defendants in the indictment was guilty of an assault with the intent to murder, and that the other was guilty of an assault with the intent to rob, in that event the defendant could not be convicted." (3) "Every single fact or charge against the defendant tending to prove

his guilt, or which would be necessary in regard to same, should be clearly and satisfactorily proven; and, if not so proven, defendant should be acquitted." (4) "If there exists any reasonable or substantial doubt of the guilt of the defendant, he is entitled, as of right, to be acquitted; and, should any uncertainty whatever exist as to his guilt, he should be acquitted." (5) "In order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of defendant's guilt." (6) "If the jury should be of the opinion that defendant was in the store of Mr. Cole, but that it was only his intention to rob, and not to shoot or maim or kill, Mr. Cole, but to frighten him, that he would not be guilty of an assault with intent to murder, and that an attempt to murder implies both a purpose and an actual effort to carry that purpose into execution—defendant would not be guilty." (7) "A reasonable doubt is one that excludes every reasonable hypothesis except that of the guilt of the defendant, and only when no other supposition will reasonably account for all the conditions of the case can the conclusion of guilt be legitimately adopted."

B. M. Allen, for appellant.

Wm. C. Fitts, Attorney-General, for the State.

COLEMAN, J. The defendant and one Hargrove were jointly indicted. There were two counts, one charging an assault with intent to murder, the other with intent to rob. The defendant was tried alone and sentenced for an assault with intent to murder.

In the case of *Hawes v. State*, 83 Ala. 37, it appears that after the twelve jurors were selected and sworn to try the case, and before the indictment was read to them, G. B. Gordon, one of the jurors, was excused, because of the sickness of his wife. After a full consideration of all the authorities, it was held that the action of the court was justified by the necessities of the case, and his ruling was not available to the defendant. This authority is decisive of all the questions growing out of the impaneling of the jury and the judgment of the court sustaining a demurrer to the plea of former acquittal.

In the case of *State v. Beavers*, 103 Ala. 36, it was held that

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a witness might testify that he saw and recognized the defendant after his arrest, as the same person whom he saw commit the offense. There was no error in applying the same rule to the case at bar. It was also competent to prove that the defendant was seen in the vicinity where the offense occurred, on the morning after its commission. The testimony showed that the witness Cole, who was assaulted, had the defendant arrested several months after the assault had been made.

This witness had testified that he knew and identified the defendant at the time of the assault. On his cross-examination he was asked if he did not sue out the warrant a day or two after he was told by one Polly Foster that she overheard the defendant and one Hargrove conspire to rob the witness Cole. The witness Polly Foster, after testifying in behalf of the state to the conspiracy, on her cross-examination was asked if the defendants did not have her arrested on a criminal charge, and, one or two days afterward, if she did not inform Mr. Cole of the alleged conspiracy of the defendants to rob him, and that, immediately thereafter, Mr. Cole instituted the prosecution against the defendant. The evidence thus elicited on cross-examination by the defendant was competent as tending to affect the credibility of the witnesses for the prosecution, and the question is presented whether it was competent, in rebuttal, to show that the witness Polly Foster had made the same statement to Cole and to others before her arrest as she made subsequent to it. We are of opinion that such evidence is competent. The distinction must be kept in mind between such evidence and its purpose; and, when a witness attempts to corroborate his own evidence by proof of having made similar statements to others, the latter are inadmissible. It is mere hearsay and not competent as tending to prove a fact; but, when it is sought to discredit the witness by attributing his or her testimony to some act on the part of the person testified against, calculated to excite unfriendly feelings in the witness, in rebuttal of the inference to be drawn from such act it may be shown that the witness made the same statement prior to the time when the proven act occurred. This evidence could not be considered as original or corroborating evidence of the truth of the fact testified to, but purely in rebuttal of the inference that the testimony was manufactured or the result of the unfriendly act.

The record is not very clear as to the competency of all the witnesses to testify as to the soundness of mind of Polly Foster. In our opinion, if there was any error, it was for the advantage of the defendant. In the case of *Burney v. Torrey*, 100 Ala. 157, it was said that, sanity being the normal condition of mankind, a non-expert who had enjoyed proper opportunities, from a long and familiar acquaintance, to form a correct judgment as to the mental condition of another, was competent to testify that the person possessed a sane mind, but that a non-expert was not competent to give an opinion as to the insanity of another without stating the facts and circumstances upon which he based his opinion.

There is nothing in the point that the defendant demanded that he be tried jointly with Hargrove, who was jointly indicted. The facts showed that Hargrove had not been arrested at the time when the defendant was put upon his trial, and the demand for a joint trial was not made until the organization of the jury had been entered upon. We held, also, in the case of *Woodley v. State*, 103 Ala. 23, that the proper construction of the statute empowered each defendant to demand a severance, and not a joint trial.

In regard to the question to be propounded to a witness examined as to character, not as affecting the fact of the guilt or innocence of a defendant, but the credibility of a witness who has testified, it is proper to inquire as to his general character for truth and veracity; but the inquiry is not limited to general character for truth and veracity. It is permissible to show general bad character, and that the party is not entitled to credibility because of his general bad character, although it may not be notoriously bad for truth and veracity. This proposition rests upon the well-recognized fact that the evidence of a person of notorious bad character is not entitled to the same weight as one whose life and conduct command the confidence of the public. *Ward v. State*, 28 Ala. 53; *McInerney v. Irvin*, 90 Ala. 275; *Mitchell v. State*, 94 Ala. 68. The court ruled in accordance with these principles.

There was no error in excluding text-books as evidence.

The court did not err in receiving evidence of the good character of the witness many years preceding the trial, and when the witness whose character was attacked lived at Gadsden. We considered this question in the case of *Jones v. State*, 104 Ala. 30.

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Hargrove was not on trial, and the jury were not called on to determine his offense, or whether he was guilty of any offense, in order to arrive at a proper conclusion as to the guilt of the defendant.

The third charge requested for the defendant asserts that "every single fact or charge against the defendant tending to prove his guilt, should be clearly and satisfactorily proven, or else the defendant must be acquitted." Although there may have been many facts tending to show his guilt not clearly and satisfactorily proven, yet there may have been sufficient other evidence to satisfy the jury, beyond a reasonable doubt, of the guilt of the defendant. This charge was properly refused.

The fourth charge requested, exacts too high a measure of proof. It asserts that, if "any uncertainty whatever exist," the defendant should be acquitted.

The fifth charge is objectionable for the same reason. It may be that some of the inculpatory facts are capable of explanation, while others may not be. If there was inculpatory evidence sufficient to satisfy the jury, beyond a reasonable doubt, of the guilt of the defendant, which was incapable of reasonable explanation consistent with his innocence, it was the duty of the jury to convict, notwithstanding some facts of a criminal character may have been capable of explanation consistent with his innocence.

The sixth charge is objectionable for several reasons. It asserts in effect, that, although the facts might show that the defendant was guilty of an assault with intent to rob, he must be acquitted if the jury should believe he was not guilty of an assault with intent to murder. If the predicate had been correct, the proper conclusion would have been an acquittal of an assault with intent to murder, and not an acquittal generally. This charge was objectionable for the further reason that it was argumentative and misleading. The defendant may have been in the store, and at one time his only intent may have been to frighten and rob, but it would not follow that the intent to murder did not succeed the first intent, and did not exist at the time the pistol was fired.

The seventh charge requested is confused and misleading. The use of the word "supposition," in a charge, of itself has a tendency to excite an imaginary or speculative inquiry, and is not permissible unless the context shows that it is a supposi-

tion or hypothesis reasonably arising from or suggested by the facts in evidence. *Garrett v. State*, 97 Ala. 18; *McGehee v. State*, 52 Ala. 224; *Cohen v. State*, 50 Ala. 112. The first clause of the charge, to wit, "A reasonable doubt is one that excludes any reasonable hypothesis except that of the guilt of the defendant," no doubt asserts a proposition of law which should be given; but when this proposition is followed as a part of the same charge with the further statement, "and only when no other supposition will reasonably account for all the conditions of the case can the conclusion of guilt be legitimately adopted," the meaning becomes obscure. What is meant by "reasonably accounting for all the conditions of the case" is not plain nor readily understood. Charges should be expressed in plain, simple language. The juries have been taught, and are fully advised as to the degree of conviction of mind necessary to constitute satisfaction beyond a reasonable doubt. The courts ought to, and we have no doubt, when requested, always do, instruct the jury that, before they can convict in a criminal case, the evidence must satisfy them beyond a reasonable doubt of the defendant's guilt, and when this principle is couched in language that misleads and deceives the court itself, it must certainly be calculated to mislead and confuse the average juror. There can be no reversible error in refusing such charges.

The evidence in this case, as it appears in the record, is not so conclusive of the defendant's guilt as to be entirely satisfactory; but we are confined to reviewing the rulings of the trial court, and in these we find no error. The weight and credibility of the evidence were for the jury. Affirmed.

NOTE.—*Self-defense*.—Where a plea of self-defense is based on the fact that the person attempting to arrest defendant for a misdemeanor was not an officer, and the evidence authorizes the court to determine as a matter of law that the person was an officer, error in submitting such question to the jury is not prejudicial to defendant. *Gratz v. Com.*, 96 Ky. 162.

On a trial for felonious assault, where there was evidence that defendant shot without provocation, a charge that defendant would be justified in using a pistol if one was advancing on him with a knife, and "defendant was in imminent danger of losing his life, or of great bodily harm," was properly refused. *Ellis v. State*, 105 Ala. 72.

Not bound to elect.—On a prosecution for an assault in which three shots were fired by the accused in quick succession, the state can not be required to elect for which of the shots it will prosecute. *Id.*

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COMMONWEALTH v. MURPHY.

SAME v. ENOS.

(165 Mass. 66.)

ASSAULT WITH INTENT TO COMMIT RAPE: *Effect of consent—Federal constitution—Cruel and unusual punishment—Knowledge of age—Intent.*

1. Under St. 1893, c. 466, one who has carnal knowledge of a girl under sixteen years of age is guilty of rape, even if she gives her full consent.
2. Const. U. S. art. 8, prohibiting cruel and unusual punishments, has no application to crimes against the laws of a state.
3. St. 1893, c. 466, subjecting one who has carnal knowledge of a girl of sixteen to the possibility of imprisonment for life, does not inflict a cruel and unusual punishment.
4. Under St. 1893, c. 466, it is not necessary to show that one who had carnal knowledge of a girl under sixteen knew, or had good reason to believe, that she was under that age.
5. One who intentionally commits a crime is criminally responsible for the consequences, if the act proves different from that which he intended.

Exceptions from Superior Court, Bristol County; Henry K. Braley, Judge.

Daniel F. Murphy and E. Edward Enos were separately convicted under St. 1893, c. 466, providing that whoever carnally knows and abuses a female child under the age of sixteen years shall be punished with imprisonment for life, etc. Defendants excepted. Exceptions overruled.

Andrew J. Jennings, District Attorney, for the Commonwealth.

H. J. Fuller, for defendant in first case.

F. V. Fuller, (*H. J. Fuller* with him,) for defendant in second case.

KNOWLTON, J. These cases may be considered together, as substantially the same questions are raised in both of them.

Under Pub. St. c. 202, §§ 27, 28, the question whether an indictment for an assault with an intent to commit rape upon a female child under the age of ten years can be maintained, if the child consents to what is done, was very fully considered in *Com. v. Roosnell*, 143 Mass. 32, and decided in the affirmative. This case must be deemed to have settled the law in this commonwealth in accordance with the weight of judicial

opinion, although there is some conflict of authority in other jurisdictions.

The several acts in amendment of section 27, above cited, which raise the age of consent by girls to carnal connection, do not assume to change the nature of an offense to which they relate. One who unlawfully, carnally, knows and abuses a female child under the age of sixteen years, is guilty of the same crime, under St. 1893, c. 466, as one who committed the offense upon a child under the age of ten years, when Pub. St. c. 202, § 27, were in force. St. 1886, c. 305; St. 1888, c. 391; St. 1893, c. 466. There is no doubt of the intention of the Legislature to treat the crime of having carnal connection with a girl under the age of sixteen years as rape, even if she gives her full consent so far as she is capable of consenting.

The defendants contend that the statute last cited is in conflict with Article 8 of the Amendments to the Constitution of the United States, and of Article 26 of our Declaration of Rights, because it provides for the infliction of a cruel and unusual punishment.

The first of these articles has no application to crimes against the laws of a state. *Com. v. Hitchings*, 5 Gray, 482. Without implying that article 26 of our Declaration of Rights is applicable to the statute before us, it is clear that the punishment prescribed is not cruel or unusual in kind.

There is some ground for the contention that the statute is a departure from the principles which lie at the foundation of our ancient law in regard to rape, and which justify the treatment of it as one of the most heinous crimes that can be committed. [The legislation is different in character from St. 1886, c. 329, and St. 1888, c. 311, which were enacted for the punishment and prevention of seduction. But whatever we may think of the policy of a statute that treats a girl of fifteen years and eleven months old, however mature she may be in body and mind, as if she were incapable of committing the crime of fornication, and subjects a boy of the same age, with whom she joins in sexual intercourse, to a possibility of the same punishment as if he were guilty of murder in the second degree, the Legislature is ordinarily the judge of the expediency of creating new crimes, and of prescribing penalties, whether light or severe, for prohibited acts. We can not say that the punishment prescribed for this offense, when the girl

is nearly sixteen years of age, and voluntarily participates in it, is beyond the constitutional power of the Legislature to inflict.

The presiding justice was asked to instruct the jury that, unless the defendant knew, or had good reason to believe, that the girl was under sixteen years of age, he could not be convicted. How far a mistake of fact in regard to the nature of his act may be availed of by a defendant in a criminal case is sometimes a difficult question to answer. In general it may be said that there must be *malus animus*, or a criminal intent. But there is a large class of cases in which, on grounds of public policy, certain acts are made punishable without proof that the defendant understands the facts that give character to his act.

In such cases it is deemed best to require everybody, at his peril, to ascertain whether his act comes within the legislative prohibition. Among these cases are prosecutions for the unlawful sale of intoxicating liquor, for selling adulterated milk, for unlawfully selling naphtha, for admitting a minor to a billiard room, and the like. *Com. v. Savery*, 145 Mass. 212; *Com. v. Farren*, 9 Allen, 489; *Com. v. Wentworth*, 118 Mass. 441; *Com. v. Emmons*, 98 Mass. 6; *Com. v. Raymond*, 97 Mass. 567; *Com. v. Connelly*, 163 Mass. 539. Considering the nature of the offense, the purpose to be accomplished, the practical methods available for the enforcement of the law, and such other matters as throw light upon the meaning of the language, the question in interpreting a criminal statute is whether the intention of the Legislature was to make knowledge of the facts an essential element of the offense, or to put upon every one the burden of finding out whether his contemplated act is prohibited, and of refraining from it if it is. The application of this rule to crimes like bigamy and adultery has led to some conflict of authority. *Com. v. Hayden*, 163 Mass. 457. *Reg. v. Tolson*, 23 Q. B. Div. 168. See *Com. v. Presby*, 14 Gray, 65.

The defendants in the present cases knew that they were violating the law. Their intended crime was fornication, at the least. It is a familiar rule that, if one intentionally commits a crime, he is responsible criminally for the consequences of his act, if the offense proves to be different from that which he

intended. See *Reg. v. Prince*, L. R. 2 Crown Cas. 154, 175. Exceptions overruled.

NOTE.—Intent, question for jury.—In a prosecution for assault with intent to commit rape, the intent with which the assault was committed is a question for the jury. *People v. Webster*, 111 Cal. 381.

Age of consent—Question of fact.—On the trial of a defendant for assault with intent to commit rape, it is error for the court to assume, in its rulings or instructions, that the prosecutrix was under the age of consent. *Id.*

Instructions.—In instructing the jury as to an assault upon the prosecutrix with an intent to commit a rape, the court stated that if the defendant "caught hold of her, and used force or violence and threats, with intent to carnally know her, then, in that case, you should find him guilty of an assault with intent to commit a rape, and in that case it would make no difference that he might have failed to accomplish his purpose." Under the circumstances of the case, *held*, not to be erroneous. *State v. Kendall*, 56 Kas. 238.

Complaint of the injury.—The state may only inquire of the prosecutrix whether she made complaint of the injury, and when, and to whom, but not as to the particular facts which she stated; still the defense, in cross-examination, may inquire as to such particular facts. *Wood v. State*, 46 Neb. 58.

Under age of consent.—Assault upon a girl under the statutory age of consent, with intent to commit a rape, whether the girl consented or resisted is immaterial; and to constitute the offense it is, therefore, unnecessary to prove that the defendant intended to use force, if necessary, to overcome her resistance. *Id.*

Evidence held insufficient.—Evidence that defendant, while in a sitting position on a path leading from prosecutrix's house to a well, solicited her as she passed him on her way to the well to have sexual intercourse with him; that, on her reply that she was not that kind of a woman, he followed her with his privates exposed, to a fence near the well, but did not go beyond it; and that he was never nearer her than twelve feet—is insufficient to show an assault with intent to rape. *State v. Jeffreys*, 117 N. C. 743.

Information.—In an information it was charged that the defendant did "unlawfully, feloniously and carnally know and forcibly ravish" a female under the age of eighteen years. The defendant, assuming that two offenses were charged in the information, moved the court to require the state to elect upon which offense it would stand for trial. At the time of the filing of the motion to elect and of the argument thereon, the defendant was not actually present in court. The motion was overruled, and a conviction followed. *Held*, that the absence of the defendant during the filing and argument of the motion is not fatal to the judgment of conviction. *State v. Kendall*, 56 Kas. 238.

STATE v. BARDWELL.

(72 Miss. 535.)

BANKING LAWS: *National banks—Receiving deposits while insolvent—Indictment—Jurisdiction.*

1. An indictment, under a statute declaring it an offense if an officer of a bank shall receive a deposit, "knowing, or having good reason to believe, the establishment to be insolvent," is not sufficient where it does not allege the insolvency, but merely follows the words of the statute, as there would be no offense if the bank was not insolvent, though the officer believed it was.
2. A state court has jurisdiction of an indictment against an officer of a national bank for receiving a deposit when the bank was insolvent, this not being made an offense by the laws of the United States.

Appeal from Circuit Court, Oktibbeha County; Newnan Cayce, Judge.

A demurrer was sustained to an indictment against W. H. Bardwell, and the state appeals. Affirmed.

Frank Johnston, Attorney-General, for appellant.

T. B. Carroll and Orr & Orr, for appellee.

COOPER, C. J. The appellant was indicted in the Circuit Court of Oktibbeha County, for that, being cashier of the First National Bank of Starkville, he did, on the 3d day of July, 1893, receive from one James Foster a certain sum of money on deposit, "then and there knowing, and having good reason to believe, that said bank was then and there insolvent, without then and there, or at any other time, previously informing said James Foster of such insolvent condition of said bank." The defendant demurred to the indictment, and his demurrer was sustained, and the indictment quashed. The state appeals.

The demurrer contained many causes, but those relied on by the appellee here, are: 1. That the indictment does not aver that the bank was in fact insolvent when the deposit was received. 2. That the indictment shows the defendant to have been an officer of a national bank, organized under the act of congress; that these banks are governmental agencies of the United States, and are therefore not subjected to regulation or control by state authority.

The statute under which the indictment was found, is as fol-

lows: "If the president, the manager, cashier, teller, assistant clerk, or other employe or agent of any bank or banker's office, or establishment, conducting the business of receiving on deposit the money or other valuable things of other persons, shall remove or secrete or conceal the assets or effects of such establishment for the purpose of defrauding any of the creditors of the establishment, or shall receive any deposit knowing, or having good reason to believe, the establishment to be insolvent, without informing the depositor of such condition, on conviction, he shall be imprisoned in the penitentiary not longer than five years." Code 1892, § 1089. The purpose of the statute is to protect depositors against the acts of officers and employes of establishments, first, in withholding by abstracting or concealing the assets, so that they may not be subject to the demands of creditors; and second, in receiving deposits while the establishment is insolvent, and such condition is known to the officer, or such facts are known as to give him good reason to believe the condition of actual insolvency to exist.

The district attorney, in preparing the indictment, has followed the precise language of the statute. What is charged may be true, and yet the defendant may not be guilty of the offense contemplated. The condition of the bank when the deposit was received, may have been such that the defendant then had good reason to believe it to be insolvent, and yet, in fact, it may not have been so. It is the receipt of the deposit into an actually insolvent establishment by an officer or agent knowing, or having good reason to believe, the fact of such real insolvency, that is made criminal by the law, and this essential fact should be averred in indictments under the statute. *Jesse v. State*, 28 Miss., 100; *Harrington v. State*, 54 Miss., 490; *Sullivan v. State*, 67 Miss., 346; *Ravels v. State*, 70 Miss., 739.

The contention of counsel for the defendant that defendant is not punishable under the above statute, because the act made criminal by it was committed by him, if committed at all, as an officer of a national bank, over whom the United States alone has jurisdiction to punish, is not maintainable. Section 5209 of the revised statutes of the United States provides that "every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association;

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Section 711 of the revised statutes declares that "the jurisdiction vested in the courts of the United States, in all cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states. First, of all crimes and offenses cognizable under the authority of the United States," etc. The act made punishable by our statute is not made an offense by the laws of the United States. No indictment in the courts of the United States could have been returned against the defendant for receiving the money of a deposit or when the bank was, in fact, insolvent, and known by the defendant so to be. In *People v. Fonda*, 62 Mich., 401, it was held that a clerk in a national bank could not be indicted and convicted of embezzlement of the moneys of such bank, in a state court, and under a state statute, for the reason that the act was made punishable by the laws of the United States and the jurisdiction of the courts of the United States declared by section 711 of the revised statutes to be exclusive of the courts of the several states. In *Com. v. Tenney*, 97 Mass., 50, the defendant, a clerk in a national bank, was indicted under the statutes of the state, for the embezzlement of certain bonds, the property of one Pope, deposited in said bank. The statutes of the United States at that time punished the embezzlement of the property of national banks, but not of the property of individuals, deposited with, and in the custody of such banks. The conviction was upheld, the court saying: "As the federal courts have no criminal jurisdiction, except that

conferred by congress, no question can be made as to the constitutionality of state legislation punishing such frauds, until they have been made punishable by the federal laws. There is no view of the relative or of the concurrent powers of the two governments which affects the decision of the present case, for all courts and jurists agree that state sovereignty remains unabridged for the punishment of all crimes committed within the limits of the state, except so far as they have been brought within the sphere of federal jurisdiction by the penal laws of the United States."

In *Com. v. Felton*, 101 Mass., 204, the indictment alleged that Martin the cashier of a national bank, had embezzled its funds, and that Felton, the defendant, was an accessory before the fact. It was decided that, since the act of Congress made the act of Martin punishable as a misdemeanor, he could not thereafter be indicted under the statutes of the state; and, since the act of the principal was made a misdemeanor by the federal law, the defendant could not be indicted as an accessory, since there are no accessories in misdemeanors. These two cases illustrate the rule, which is, that so long as the general government has not declared the act an offense against its laws, it is competent for the states to declare it an offense, and punish therefor. But when, as to a matter within the competency of the United States, congress undertakes to legislate, and covers the whole subject, the jurisdiction of the state is, or may be thereafter denied. *Fox v. Ohio*, 5 How. (U. S.) 410; *Moore v. Illinois*, 14 How. 13; *People v. White*, 34 Cal., 183. The judgment is affirmed.

NOTE.—*Presumption*.—The law presumes that the relation existing between a bank and its customer, is that of ordinary debtor and creditor. *Nichols v. State*, 46 Neb. 715.

Same.—Whether a deposit made in a bank by its customer, is a general or special one, is a question of fact to be determined from the intention of the parties, but, in the absence of evidence, the law presumes such a deposit a general one. *Id.*

Where a customer of a bank, who has overdrawn, and thus stands indebted in open account to the bank, makes a general deposit therein, the presumption of law is that such deposit was made and received toward the payment of such overdraft. Id.

The object of the enactment of sections 637, 638, Comp. St. 1895, was to prevent an insolvent banking association from borrowing money, that is, receiving money on deposit, and becoming debtor therefor; but said sections should not be so construed as to render an officer of a banking associa-

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tion guilty of a felony for permitting a debtor of the association to pay his debt thereto. *Id.*

N. was indicted for receiving a deposit in a bank of which he was cashier, knowing at that time the bank was insolvent. The state, to sustain the indictment, offered evidence which tended to show the existence of the bank; that N. was its cashier; that it was insolvent, to his knowledge, on the 18th of February, 1895; and that on said date one M. deposited in said bank \$11. N. then offered to prove that when M. made such deposit he was overdrawn at the bank \$15.30. The court excluded the offer. *Held*, error. *Id.*

CARR v. STATE.

(104 Ala. 4.)

BANKING LAWS: *Receiving deposit, knowing bank is insolvent—Extradition—Jury.*

1. A person extradited from another state may be tried on charge other than that on which he was extradited, without first being tried on the latter, or given a chance to return to the state which surrendered him.
2. An indictment describing "three hundred and fifty-five dollars, lawful money, currency of the United States of America, a more particular description of said money being unknown," alleges the value of the property, and that such property was "money or thing of value."
3. The refusal of a continuance can not be reviewed.
4. The court need not allow defendant to examine jurors pronounced competent on the *voir dire*, to show a cause of challenge not brought to light by the statutory interrogations.
5. On the trial of a banker for receiving money on deposit, knowing the bank to be insolvent, one who is prosecuting witness in another like case pending against accused, and who believes him guilty in that, is not a competent juror.
6. Under the act (Acts 1892-93) making guilty of a misdemeanor, a bank officer or agent who shall receive for deposit any money, knowing at the time that the bank is insolvent, a manager who keeps his bank open for business, knowing it to be insolvent, is guilty in respect to a deposit received by the teller in the course of business, though the manager himself be not present, or even in town, and the teller himself have no guilty knowledge.
7. The teller need not have been specifically authorized by defendant manager to receive the particular deposit.
8. It is immaterial whether the bank became insolvent through misfeasance of defendant, or disasters as to which he was blameless.
9. It is immaterial whether the insolvency consists in inability to pay depositors or other creditors, or both.
10. A charge that, if the jury believe from the evidence that the act was

a lawful act, then defendant is not guilty, submits the law to the jury.

11. A charge authorizing conviction on mere belief, without mention of "reasonable doubt," is error.

Appeal from District Court, Colbert County; W. P. Chitwood, Judge.

Hinton E. Carr was convicted of receiving a deposit, knowing his bank to be insolvent, and appeals. Reversed.

The appellant was tried and convicted under the following indictment: "The grand jury of said county charges that, before the finding of this indictment, Hinton E. Carr, who was at the time the president of the Tuscumbia Banking Company, a banking firm, engaged in a banking business, received from Robert T. Abernathy, for deposit, three hundred and fifty-five dollars, lawful money, currency of the United States of America, a more particular description of said money being unknown to the grand jury, and the said Hinton E. Carr knew at the time said deposit was received, or had good cause to believe, that said banking firm was in a failing or insolvent condition.

"And the grand jury of said county further charge that, before the finding of this indictment, Hinton E. Carr, who was at the time a member of the firm styled the Tuscumbia Banking Company, a partnership composed of Hinton E. Carr and Emma Carr, which firm or partnership was engaged in the banking business, received for deposit from Robert T. Abernathy three hundred and fifty-five dollars, lawful money, currency of the United States of America, a more particular description of said money being unknown to the grand jury; and the said Hinton E. Carr knew at the time said deposit was received, or had good cause to believe, that the said firm or partnership was in a failing or insolvent condition—against the peace," etc.

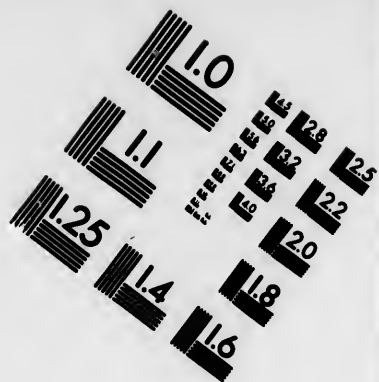
The defendant pleaded the following plea in abatement: "Comes the defendant, Hinton E. Carr, and pleads to the jurisdiction of the court in this cause, and objects to his being put upon his trial, because he says that he was, on the 7th day of August, 1893, and previous thereto, in the State of Iowa, and had gone there for the purpose and intent of making his home in said state; that while there he was arrested, and was, by order of the Governor of said State, extradited to the State of

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Alabama for the charge of embezzlement, and not for the offense set out in the indictment in this cause, which original warrant of extradition issued by said Governor of the State of Iowa is made a part of this plea. And he alleges that he was a resident of said State of Iowa when said warrant of extradition was granted, wherefore he prays that said indictment be abated, and he further prays that he be not placed upon trial upon the same. He further pleads to the jurisdiction of this court in the premises, and he insists and pleads that he can be only tried for the offense upon which he was extradited, and he alleges and states that he was not extradited for the offense charged herein."

To this plea the State replied that, after the defendant was brought to the State of Alabama, the indictment in the present case was found by the grand jury of Colbert county, Ala., and the defendant was arrested in the State of Alabama upon the writ of arrest issued upon said indictment; and, further, that, because the defendant was extradited for one offense, does not preclude his prosecution for any other offense the defendant may have committed in this State. The plea in abatement was overruled and disallowed, and the defendant then demurred to the indictment, and upon the demurrer being overruled, the defendant moved the court for a continuance on the ground that he had been extradited for an offense different from the one for which he was now indicted, and was therefore taken by surprise, and had not had an opportunity to prepare a defense to the present indictment, which he could do if the continuance was granted, and time allowed him; and that he had a good and valid defense to the present prosecution. The court overruled this motion for a continuance, and the defendant duly excepted.

On impaneling the jury for the trial of the defendant, the court asked the usual questions as to qualification. The defendant, by leave of the court, examined one August Neff, who said he had been a witness before the grand jury in a similar case to this, and had a like case now pending in the same court against the defendant, and believed that the defendant was guilty in the case in which he was a witness. The defendant objected to the juror as being incompetent, and challenged him for cause. The court overruled the objection, and putting the juror upon the defendant, he challenged him per-



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emptorily. To this action of the court the defendant duly excepted. "The defendant then asked the court leave to examine any juror upon his *voir dire* as to his fixed opinion, and to show if he had a like case pending in this court and against this defendant." The court refused to allow defendant to put the jurors upon their *voir dire*, and the defendant duly excepted.

The testimony for the state tended to show that one R. T. Abernathy, Jr., had, at the direction of his father, deposited in the Tuscumbia Banking Company, a firm composed of the defendant and his wife, \$355; that Birt Harrington was the assistant cashier, and received the money, and that the money had never been paid back to the said R. T. Abernathy, Sr.; that the bank failed June 8, 1893, a short time after the deposit of said amount was made, which was on May 5, 1893. The defendant moved to exclude this testimony on the ground that it showed the deposit was made with "The Tuscumbia Banking Company," and not with the defendant, as charged in the indictment. This motion was overruled, and the defendant duly excepted. The state also introduced evidence tending to show that the said Birt Harrington was regularly employed as assistant cashier of the Tuscumbia Banking Company, and had authority to receive deposits. The other facts are sufficiently stated in the opinion.

The court at the request of the state, gave to the jury the following written charges:

(1) "If the jury believe from the evidence that the defendant was, on the 5th day of May, 1893, engaged in a banking business in Colbert county, Alabama, under the firm name and style of Tuscumbia Banking Company, and that the said Banking Company was a partnership composed of the defendant and his wife, Emma Carr, and that the said Banking Company was at said time insolvent, or in a failing condition, and defendant knew, or had good cause to believe it, and employed Birt Harrington to act as assistant cashier of the bank, and made it his duty to receive deposits, and that he (Harrington) did receive \$355 from R. T. Abernathy on deposit on the 5th day of May, 1893, then you should find the defendant guilty."

(2) "If the jury believe from the evidence that the Tuscumbia Banking Company, composed of defendant and his wife, were on the 5th of May, 1893, doing a banking business,

that said Tuscumbia Banking Company had in its employ Birt Harrington, whose duty it was to receive deposits, and believe further that said Tuscumbia Banking Company was on the 5th day of May, 1893, in a failing or insolvent condition, and that defendant knew, or had good cause to believe it was in a failing or insolvent condition, and further believe that on the 5th day of May, 1893, Birt Harrington, in the employ of defendant, received from R. T. Abernathy \$355 on the deposit, then the jury should find the defendant guilty as charged in the indictment." To the giving of each of these charges the defendant separately excepted, and likewise separately excepted to the court's refusal to give each of the following, among other, charges requested by him in writing:

(2) "If the jury believe from the evidence that Birt Harrington received the deposit from Abernathy without instructions from Carr, then they must find for the defendant."

(3) "Unless the jury are satisfied, beyond a reasonable doubt, from the evidence, that Carr authorized or directed Harrington, or had knowledge of Harrington receiving the deposit made by Abernathy, then they must find for the defendant."

(5) "If the jury believe from the evidence that the assets of the bank became so depreciated in value as to cause the failure of the bank, and that it was not the acts of Carr, then they must find for the defendant."

(6) "Unless the jury are satisfied, beyond a reasonable doubt, that the defendant intended to defraud the depositors, and that it was not through depreciation of value of assets that the bank failed, then they must find for the defendant."

(8) "If the jury believe from the evidence that Carr's or the bank's credit was good on 5th of May, and so continued till 8th of June, and that depreciated assets caused during that time its failure, then they will find for the defendant."

(9) "If the jury believe from the evidence that the failure of the bank [was] not through fault of Carr, then they will find for defendant."

(10) "Unless the jury are satisfied, beyond a reasonable doubt, that when this deposit was made, Carr knew the bank was in failing circumstances, and that Carr intended to injure, defraud, or apply the money to his own use, then the jury will find for the defendant."

(12) "If the jury believe from the evidence that Harrington received the deposit made by Abernathy in Carr's absence, and without Carr's knowledge, or instructions to do so, then they must find for the defendant."

(15) "If the jury believe from the evidence that, if property around and about the bank and its proximity had not depreciated so, that then this suit would not have been instituted, then they must find for defendant."

(16) "Before the jury can convict, they must find from the evidence, beyond a reasonable doubt, that Carr knew the bank was in failing circumstances when the deposit was made; that he must have received the deposit in person, or have authorized or directed Harrington to receive it, and that it was done by and with Carr's consent and knowledge."

(17) "The jury must be satisfied from the evidence, beyond a reasonable doubt, that Carr must have authorized the receipt of the money deposited, or he must have been present, and he also must have known the bank was in failing circumstances before they can find the defendant guilty."

(19) "Before the jury can convict in this case they must be satisfied, beyond a reasonable doubt, that Carr knew of the failing condition of the bank at the time of the deposit; that he received the deposit himself, or authorized or directed or knew of it when done."

(23) "Before the jury can convict in this cause, they must be satisfied, beyond a reasonable doubt, that the defendant knew, at the time of the receipt of the money, of its receipt, and that the defendant knew, or had good cause to believe the bank to be in a failing or insolvent condition, and knew of the receipt of the deposit."

(27) "If the Tuscumbia Banking Company failed on account of depreciation of the bank's property and assets after the deposit was made by Abernathy, then the jury must find for the defendant."

(31) "If the jury believe from the evidence that the deposits made in the bank were invested in property and loans, an ordinary way of banking, and that the property and lands have so failed and depreciated since Abernathy's deposit that money could not be realized on them to satisfy the depositors, then the jury must find for the defendant."

(33) "The state must prove to your satisfaction, beyond all

reasonable doubt, that Carr received the deposit of Dr. R. T. Abernathy."

(35) "Unless the jury believe from the evidence, beyond all reasonable doubt, that Carr knew of the receipt of the deposit of \$355, or assented to it, or authorized its receipt, then they will find the defendant not guilty."

(36) "Unless the evidence satisfies the minds of the jury, beyond all reasonable doubt, that Carr knew of the deposit at the time of its reception, then they will find the defendant not guilty."

(37) "Unless the evidence satisfies the minds of the jury, beyond all reasonable doubt, that Carr authorized Harrington to receive the deposit of \$355 from R. T. Abernathy, then they will find the defendant not guilty."

(39) "Unless the evidence satisfies the jury, beyond all reasonable doubt, that the defendant was present at the time, controlling and managing the bank, when the deposit was received by Harrington, then they will find the defendant not guilty."

(41) "The jury must believe from the evidence beyond all reasonable doubt that Carr received from Robert T. Abernathy, for deposit, \$355, and further, that defendant knew at the time said deposit was received, or had good cause to believe, that the Tuscumbia Banking Co. was in a failing condition, before they can find him guilty."

(42) "Gentlemen of the jury, the defendant can not be convicted unless the evidence satisfies your minds, beyond all reasonable doubt, that Carr procured, counseled, or commanded Harrington to receive the deposit of Dr. Abernathy, and if the state has so failed to prove it to your satisfaction, beyond all reasonable doubt, then you will find the defendant not guilty."

Asa E. Stratton and Jackson, Orme & Cooper, for appellant.
Wm. L. Martin, Attorney-General, and Thos. R. Roulhac,
for the State.

McCLELLAN, J. There has been some conflict in the adjudged cases, but it may now well be considered as settled by the numerical and intrinsic weight of the decisions in other States, by an adjudication of this court, by the unanswerable argu-

ment of Mr. Moore in his work on Extradition and Inter-State Rendition, and finally by the Supreme Court of the United States, that a fugitive from justice, who has been surrendered by one State of the Union to another State, upon requisition charging him with the commission of a specific crime, has, under the constitution and law of the United States, no right, privilege, or immunity to be exempt from indictment and trial, in the State to which he is surrendered, for any other or different offense from that designated in the requisition, without first being tried on the charge for which he was extradited, or having an opportunity to return to the State from which he was extradited. *In re Noyes*, 17 Albany L. J. 407; *Ham v. State*, 4 Tex. App. 645; *State v. Stewart*, 60 Wis. 587; *Post v. Cross*, 135 N. Y. 536; *Com. v. Wright*, 158 Mass. 149; *In re Miles*, 52 Vt. 609; *Ex parte Barker*, 87 Ala. 4; 2 Moore on Extrad., §§ 642-644; *Lascelles v. Georgia*, 148 U. S. 537.

The trial court did not err, therefore, in putting the defendant on trial in this case, notwithstanding the fact, presented by plea and otherwise, that he had been surrendered by the State of Iowa on another and different charge, upon which he had not been tried, and was still being held.

The indictment in this case is drawn under, and pursues the language of the act of December 12, 1892, "To prevent banks, bankers, firms, corporations, or other persons from receiving deposits of bank notes, specie, money, or other thing of value, when in a failing or insolvent condition," and averring that the defendant received from "Robert T. Abernathy for deposit, \$355, lawful money, currency of the United States of America, a more particular description of said money being unknown to the grand jury," etc. It was not open to the demurrer interposed by the defendant, which proceeded on the grounds that no value was alleged, and that the indictment failed to allege a deposit of money or thing of value, within the terms of the statute. The demurrer was properly overruled. *Du Bois v. State*, 50 Ala. 139; *Duvall v. State*, 63 Ala. 12.

The action of the trial court in denying a continuance of the case, as has long been well established, is not revisable by this court. *A. G. S. R. R. Co. v. Hill*, 90 Ala. 71; S. C., 93 Ala. 514; *Walker v. State*, 91 Ala. 76.

The court erred in putting the juror Neff on the defendant. It is quite true that the court was under no duty to allow the

defendant to further examine this juror after his competency had been pronounced on the *voir dire*, with a view to showing a cause for challenge not brought to light by statutory interrogatories, and hence it is that no error was committed in refusing to allow such further examination in respect of other jurors. *Bales v. State*, 63 Ala. 30; 12 Am. & Eng. Enc. Law, p. 358; *Huwes v. State*, 88 Ala. 37, 66; *Lundy v. State*, 91 Ala. 100. But the trial judge did permit this examination in reference to Neff, and it was developed thereby that he had been a witness before the grand jury in a case against the defendant, similar to this, and had a like case to this—that is, a prosecution against the defendant for receiving from him (Neff) money on deposit after the defendant knew, or had good reason to believe, his bank was insolvent, or in a failing condition—then pending in the court, and that he believed that defendant was guilty in that case, in which he, the juror, was a witness, and in which, if there was a conviction, Neff would recover, by way of a fine, the amount of his deposit. It can not be conceived on this state of facts, that Neff could have been such impartial juror as the constitution guaranteed to the defendant in respect of the main issue common to both cases, namely, whether, when the deposits were received, the defendant knew or had good reason to believe the banking partnership, of which he was a member, was in a failing or insolvent condition. The juror should have been discharged on the defendant's challenge for cause. 12 Am. & Eng. Enc. Law, p. 350 *et seq.*; *Smith v. State*, 55 Ala. 1.

The body of the statute under which this indictment was found is in the following language (Acts 1892-93, p. 95):

"Section 1. Be it enacted by the General Assembly of Alabama, That any president, cashier or other officer, by whatever title he may be called or known, of any bank, banking firm or corporation engaged in a banking business, or any other persons engaged in said business, or the agent, or agents thereof, who shall receive for deposit any bank notes, specie, money or other thing of value, knowing at the time said deposit is received, or having good cause to believe that such bank, banking firm, corporation, person or persons, are in a failing or insolvent condition, shall, for each offense, be deemed guilty of a misdemeanor, and on conviction thereof, be fined not less than double the amount of said deposit.

"Sec. 2. Be it further enacted, That in all convictions under this act, the fine shall be paid in lawful money of the United States only, one-half of which shall go to the person who made the deposit.

"Sec. 3. Be it further enacted, That the payment back to the depositor of the bank notes, specie money or other thing of value, deposited before the conviction hereunder, and the court costs thereof, which may have accumulated, shall be a good and lawful defense to any prosecution under this act."

The evidence showed that defendant and his wife, as partners, carried on a banking business in Colbert county, Ala., under the name and style of "Tuscumbia Banking Company;" that the defendant was the managing and controlling member of said firm; and that one Harrington was the agent of said firm, and acting cashier and book-keeper thereof, at the time the deposit involved here was made. It was also made to appear that on the day said deposit was made the defendant was away from Tuscumbia, the town where the business was being carried on, and that the deposit was received by said Harrington for the Tuscumbia Banking Company. On these facts it is contended by the defendant, through objections to and motions to exclude testimony, and requests for instructions, that he did not receive the deposit alleged in the indictment, and should be acquitted on the uncontroverted evidence; the theory of the defense in this regard being that no other than a direct, personal, manual receipt of deposits can fill the terms of the enactment. There is nothing in this position. The defendant, as a member and manager of the firm called the Tuscumbia Banking Company, carried on the business of banking at Tuscumbia; he thereby, so long as the bank was kept open, invited the public, and Robert J. Abernathy, as one of the public, to make deposits with said firm. Whether present or absent personally, he provided means for the acceptance of this invitation, by the employment of Harrington to take possession of deposits tendered in consequence of it for him, and the act of Harrington in so doing is his act, as fully, in every sense, as if he had performed it by his hands; and this wholly regardless of all considerations as to whether Harrington himself might be held in criminal responsibility for his act as agent. The receipt of the deposit was in the usual course of the business, which the defendant carried on and kept open

for the very purpose, among others, perhaps, of receiving on deposit the funds of other persons, and no matter what agencies he employed, he is guilty under the statute if he at the time knew, or had good cause to believe, that the Tuscumbia Banking Company was in a failing or insolvent condition. 1 Morse on Banks & Banking, § 178; 1 Whart. Cr. Law, § 247; 2 Whart. Cr. Law, § 1503; *State v. Cadwell et al.*, 79 Iowa, 432. And equally untenable is the position advanced in objections and requests for charges, that the defendant could not be convicted because the business was conducted under the name of the Tuscumbia Banking Company, or as a firm.

Several of the charges requested were to the effect that Carr could not be convicted unless he authorized Harrington to receive this deposit from Abernathy. Of course it was essential that Harrington should be shown to have acted in the matter by authority of the firm or Carr; but it was by no means necessary to show that he had any specific authority to receive this particular deposit, as the manifest tendency of these charges was to induce the jury to conclude. They were, therefore obviously misleading.

It is wholly immaterial, under this indictment, how the Tuscumbia Banking Company came to be in a failing or insolvent condition—whether through the misfeasance or malfeasance of the defendant, or through business disasters involving nothing reprehensible on his part, or through depreciation in value of assets incident to the general monetary condition of the country. The point of sole inquiry is as to the fact of insolvency or “failing and insolvent condition,” and the defendant’s knowledge thereof, or his having good reason to so believe, at the time of deposit made. And it is obviously, also, beyond the issue whether the insolvency consists in inability to pay depositors only, or to pay other liabilities, or other liabilities and depositors. These considerations dispose of the exceptions reserved to the refusal of the trial court to give many of the charges requested by the defendant.

Of course, if the insolvency of the banking company resulted from the depreciation of property after the alleged deposit was made, the defendant could not be convicted of receiving the deposit. The statute has reference to a failing or insol-

ent condition, existing at the time when the deposit is made. But the charges requested on this point were properly refused because there was no evidence that the insolvency, if it existed at all, resulted from depreciation of property subsequent to Abernathy's deposit. They were abstract.

Charge 32 requested by the defendant, to wit, "If the jury believe from the evidence that the act of receiving the deposit of \$355 was a lawful act, then the defendant is not guilty," submits the whole case, both on the law and the facts, to the jury. In our jurisprudence, juries are not the judges and triers of the law, but of the facts only.

Two charges were given at the request of the State, and each of them is patently bad, under the decisions of this court, in that they severally authorize a conviction upon the mere belief by the jury of the facts necessary to make out the case for the State, without regard to the degree of their belief, *i. e.*, whether they so believe beyond a reasonable doubt. *Pierson v. State*, 99 Ala. 143; *Rhea v. State*, 100 Ala. 119.

If there was error in allowing the witness Harrington to testify that Mrs. Carr signed the name, "Tuscumbia Banking Company," to the deed of assignment of June 10, 1893, instead of calling an attesting witness to that signature, or in allowing the witness Sampson to depose to the contents of the mortgage covering the bank building without introducing the probated mortgage, the error was cured in the first case by subsequent proof by an attesting witness of the execution of the assignment, and the introduction of the deed in evidence, and in the other case by the subsequent introduction of the acknowledged and recorded mortgage.

Some other exceptions to the rulings of the court on the admission of testimony and in respect of charges requested by the defendant are presented by this record, but they are so patently without merit that we do not consider it necessary to discuss them.

For the errors which we have pointed out the judgment must be reversed. The cause will be remanded. Reversed and remanded.

NOTE.—*Constitutional law—Validity of statute for protection of depositors—Due process of law.*—In the very recent case of *Meadowcroft et al. v. People*, 163 Ill. 56, the question respecting the constitutionality of the act of the General Assembly of the State of Illinois, laws of 1879, making the

receipt of deposits by a banker, when insolvent, embezzlement, is discussed with great ability, and the conclusion reached that such an act does not deprive the accused of liberty or property without due process of law, as the business of banking is affected with a public interest, and is subject to regulation within the general police power. In the opinion, Mr. Justice Baker, among other things, says:

"In *Board of Commissioners v. Merchant*, 103 N.Y. 143, it is said: 'The general power of the Legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations, it is not easy to define precisely what they are. A law which would practically shut out the evidence of a party, and thus deny him the opportunity for trial, would substantially deprive him of due process of law. It would not be possible to uphold a law which made an act *prima facie* evidence of crime which had no relation to a criminal act, and no tendency whatever, by itself, to prove a criminal act. But so long as the Legislature, in prescribing rules of evidence, in either civil or criminal cases, leaves a party a fair opportunity to make his defense, and to submit all the facts to the jury to be weighed by them, upon evidence legitimately bearing upon them, it is difficult to perceive how its acts can be assailed upon constitutional grounds.' And in the later case of *People v. Cannon*, 139 N. Y. 32, the same court held that the State Legislature has power to enact that even in criminal actions, where certain facts have been proved, they shall be *prima facie* evidence of the main fact in question, but that the fact upon which the presumption is to rest must have some fair relation to or natural connection with the main fact, and that the inference of the existence of the main fact because of the existence of the fact proved must not be purely arbitrary, unreasonable, unnatural or extraordinary, and the accused must have a fair chance to make his defense and to submit the whole case to a jury. In *State v. Buck*, 120 Mo. 479, it was held, after a full review of the authorities, that a section of the statute of that State which makes it a criminal offense for an officer of a bank to receive a deposit knowing the bank to be insolvent, and providing that subsequent failure of the bank shall be *prima facie* evidence of such knowledge, is not violative of a constitutional provision that, 'the right of trial by jury, as heretofore enjoyed, shall remain inviolate.'

"Plaintiffs in error call attention to *Berwick v. People*, 13 R. I. 211, and other cases, which apparently announce a rule somewhat in conflict with that held in the authorities we have cited. They seem, however, to be against the weight of authority. At all events, this court is committed to the doctrine as held in New York, Missouri and other States, that the Legislature may provide that a designated fact or facts shall be *prima facie* evidence of a certain other fact, but subject to the restrictions stated in the authorities to which reference has been made. In *Chicago, Burlington & Quincy Railroad Co. v. Jones*, 149 Ill. 361, we said (p. 382): 'It is argued that the provision of the statute making the schedule of the commissioners *prima facie* evidence that the rates therein fixed are reasonable maximum rates of charges, is unconstitutional and void, not only as depriving the carriers of their property without due process of law, but as infringing upon the right of trial by jury. We do not think that this objection should be sustained. In the first place, the act does not deprive the railroad corporations of the right to have a judicial determination of the reasonable-

ness of the rates, if they are not satisfied with the schedule made by the commission. The courts are open to them for a review of the acts of the commissioners in fixing the rates of charges. In the next place, the provision is an exercise by the Legislature of its undoubted power to prescribe the rules of evidence. (2 Rice on Evidence, pp. 806, 807; *Commonwealth v. Williams*, 6 Gray, 1; *State v. Harley*, 54 Me. 562.) Such provisions are not unusual. Cases have arisen in this State under a statute making the fact of injury, caused by sparks from a locomotive passing along the road, *prima facie* evidence of negligence, and no question has ever been raised as to the validity of the statute. * * * Acts making tax deeds *prima facie* evidence of the regularity of proceedings antecedent to the deed have been held to be valid. 2 Rice on Evidence, p. 607; *Hand v. Ballou*, 12 N. Y. 541; *Delaplaine v. Cook*, 7 Wis. 54; *Allen v. Armstrong*, 10 Iowa, 508; *Wright v. Dunham*, 18 Mich. 414; *Gage v. Curaher*, 125 Ill. 447. See, also, *Chicago and Alton Railroad Co. v. People ex rel.*, 67 Ill. 11. And in *American Trust and Savings Bank v. Gueder & Poeschke Manf. Co.*, 150 Ill. 336, where the same statute now in question was under consideration, it was held that in cases where said statute applies, the receipt of the deposit is *prima facie* proof of fraudulent intent, and that the rule of evidence established by the statute applies both to criminal prosecutions and civil proceedings, and wherever acts done in contravention of the provisions of the statute are the subject of judicial investigation.

"If one is a banker or person doing a banking business, and receives on deposit the money of his customer, it is to be presumed that he knows, at the time of receiving such deposit, whether or not he is solvent. At all events, as he holds himself out to the public and to his customers as being possessed of money and capital, and therefore to be safely trusted, it is his duty to know, and he is, under all ordinary circumstances, bound to know, that he is solvent, and it is criminal negligence for him not to know of his own insolvency. The Criminal Code (par. 280) declares that a criminal offense consists in a violation of a public law, in the commission of which there shall be a union or joint operation of act and intention, or criminal negligence. In cases of the failure, suspension or involuntary liquidation of a banker within thirty days after he has received a deposit from his customer, it can not fairly be said that the fact of such failure, suspension or involuntary liquidation does not tend to show that he was insolvent when he received the deposit; and since, if he was then insolvent, he is presumed to have known of such insolvency at that time, and it is criminal negligence, under all ordinary circumstances, for him not then to have known of it, the inference that when he received such deposit it was with a fraudulent intent on his part, is not so purely arbitrary, unreasonable, unnatural, or extraordinary as would justify the courts in saying that such a failure within thirty days had no fair relation to or connection with the existence of a fraudulent intent at the time of the deposit, and that, therefore, the act of the Legislature is unconstitutional, null and void. The words of the statute, '*prima facie* evidence,' *ex vi termini* imply that the fraudulent intent may be rebutted by any competent testimony. It is only in a very clear case that the courts will assume to declare the invalidity of a statute enacted by the Legislature, and no clear and palpable case of invalidity here appears."

Statutes—How far rule of strict construction of a penal statute controls.

--The rule of strict construction of a penal statute is not violated by giving its words a reasonable meaning according to the sense in which they were intended, disregarding captious objections and even the demands of exact grammatical propriety. *Meadowcroft et al. v. People*, 103 Ill. 56.

Indictment--Of banker receiving deposit while insolvent.--An indictment against a banker for receiving a deposit while insolvent, in the terms and language of the statute, need not expressly aver the intent of the defendant, at the time of receiving the money, to defraud the depositor, especially where it charges that the act was corruptly, willfully, fraudulently and feloniously done. *Id.*

Same--Averment that money was received as a deposit.--An indictment charging the receipt by bankers of moneys of the person named, "then and there not being indebted to" such bankers, sufficiently charges that the money was received as bankers and as a general bank deposit. *Id.*

Same--Banking partners--Averment of insolvency.--An indictment against persons doing a banking business under a firm name, for receiving a deposit while insolvent, need not charge that the partnership, as such, was insolvent, as the partnership is not a legal entity, distinct from and independent of the persons composing it. *Id.*

Effect of elapsing of several terms, after indictment, on right of defendant to discharge.--Defendants in a criminal case are not entitled to discharge for want of prosecution because they were not tried for several terms after their indictment, where they were out on bail and never appeared in court until the term at which they were tried. *Id.*

Verdict--When not defective as fixing a joint punishment for two defendants.--A verdict finding two bankers guilty of embezzlement in receiving a deposit while insolvent, and fixing their punishment at a fine of twenty-eight dollars and, in addition, at imprisonment for one year, is not defective as fixing a joint instead of a several punishment, but imposes upon each the fine and imprisonment stated. (PHILLIPS, J., dissenting.) *Id.*

The simple act of taking a deposit while insolvent does not complete statutory offense.--A banker is not guilty of embezzlement, under the statute for the protection of depositors (Laws of 1879, p. 113), by the simple act of taking a deposit while insolvent, but, to complete the offense, such deposit, or some part of it, must, by the failure, suspension or involuntary liquidation of the banker, be lost to the depositor. *Id.*

Same.--That part of a deposit taken by a banker, while insolvent, which such banker pays out upon the depositor's checks before failure, suspension or involuntary liquidation, is not "lost" to such depositor within the meaning of the statute. *Id.*

Same--Loss of entire deposit not necessary to constitute crime.--Loss of the entire amount of a deposit taken by a banker, while insolvent, is not necessary to complete the crime of embezzlement, under the act for the protection of depositors. *Id.*

Same--When crime complete.--The crime created by the act for the protection of depositors is complete when the insolvent banker fraudulently receives the deposit, and by his failure, suspension or involuntary liquidation, by reason of insolvency, the depositor is deprived of the whole or some portion of such deposit. *Id.*

Tender of deposit by banker no defense.--Tender by a banker to a depositor of the amount of his deposit at the time of the banker's trial for em-

bezzlement, in receiving such deposit while insolvent, will not relieve him from liability under the statute. *Id.*

Evidence—Deposit of money presumed to be general.—A deposit of money with bankers at their banking house is presumed to be general unless it appears that the depositor makes it special, or deposits it in some particular capacity. *Id.*

Same—What proof supplies want of formal demand by depositor.—Proof of a demand for the deposit is not essential to conviction of a banker under the statute of 1879, where it is shown that such banker suspended payment and closed his doors against depositors and creditors and discontinued banking operations. *Id.*

Appeals and errors—When omission of a jury to find fact will not reverse.—Failure of a verdict against a banker, under the act of 1879, for receiving a deposit when insolvent, to state the value or amount of the deposit, is not cause for reversal where the fine fixed by the jury is much less than it should have been under the evidence and the law. (PHILLIPS, J., dissenting.) *Id.*

STATE V. ALLRICK.

(61 Minn. 415.)

BASTARDY: *Evidence—Instructions.*

1. In a prosecution for bastardy, where the undisputed evidence was that the child was fully developed at its birth, the defendant was entitled to an instruction that it must have been begotten more than 235 days before that date.
2. Where the evidence tended to prove that the complainant had intercourse with another man at or about the time the child must have been begotten, and about the time she testified to having intercourse with the defendant, the defendant was entitled to an instruction that even if he had intercourse with complainant, as alleged, yet unless the jury found, from a preponderance of evidence, that such intercourse resulted in pregnancy, they must find defendant not guilty.

Appeal by defendant from an order of the District Court for Mower County, John Whytock, Judge, denying a motion for a new trial.

Erick A. Allrick was convicted of bastardy, and appeals. Reversed.

Henry J. Gjertsen, for appellant.

French & Wright and S. D. Catherwood, for respondent.

MITCHELL, J. This was a prosecution under the bastardy act (Gen. St. 1894, § 2039 *et seq.*) The female, in her complaint, alleged that the child was begotten on the 9th day of September, 1892. The uncontradicted evidence was that the child was born on March 24, 1893, and was, at the time of its birth, "a full grown child, and weighed nine pounds." Upon the trial the female testified that the first time she had intercourse with the defendant was between 3 and 4 o'clock in the afternoon of Sunday, the 19th day of June, 1892; that the next time was on the 1st day of August; that there were two other times during the summer, after August 1st, four times in all; that the last time was in the second week of September, 1892. She then testified that she discovered the last of June that she was pregnant. The defendant testified that he did not have any sexual intercourse with the complainant on the 19th of June, or at any time during the months of June and July, or at any time previous to August 15, 1892. There was evidence tending to prove that the complainant had intercourse with another man on the 22d of June, 1892, but the above was all the evidence as to her intercourse with the defendant.

Upon this state of the evidence, counsel for the defendant requested the court to instruct the jury, in substance, (1) that if they found that he did not have intercourse with the complainant previous to July 1, 1892, they must find him not guilty; (2) that even if they found that he had intercourse with her in June, 1892, yet unless they found, from a preponderance of evidence, that such intercourse resulted in pregnancy, they must find defendant not guilty. These requests were both refused, and such refusals are assigned as error. We are of opinion that, under the state of the evidence, both requests should have been granted.

It can not be assumed, for the purpose of convicting the defendant, that the complainant testified falsely. He must be convicted, if at all, on the evidence actually given in court. The complainant definitely fixed the date of her first intercourse with defendant, on June 19th, and the next on August 1st. The duration of pregnancy in woman, assuming the delivery is not premature, is, according to general medical and popular observation, about nine calendar months, or, to be more precise, ten lunar months, or 280 days. Some medical authorities fix the average at 276 days. All the authorities agree

that the length of time varies somewhat, being sometimes greater and sometimes less than the usual or average period. Hence, within certain limits, the time when a child was begotten is a question of fact. But the shortest known period of gestation, in case of a fully-developed child, is considered to be about 260 days, while in some exceptional cases gestation has been protracted to about 300 days. If this child was begotten on or after August 1st, then the period of gestation could not have exceeded 235 days, or from 40 to 45 days less than the usual period. It is a matter of common knowledge, of which we have a right to take judicial notice, that if the period of gestation was only 235 days, or less, the delivery would be premature, and the child would not be fully developed at its birth. Hence, upon the evidence, the court could and should have held, as a matter of law, that this child was not begotten after August 1st.

If the evidence had tended to show that the illicit intercourse between the complainant and the defendant had been repeated at short intervals from and after June 19th, the first request would have been properly refused. But, as the evidence stood, the request was equivalent to one to instruct the jury that, if they found that defendant had no sexual intercourse with the complainant before August 1st, they must find him not guilty. As, under the evidence, the child must have been begotten before that date, such an instruction ought to have been given.

The second request should also have been granted. The evidence tended to show that the complainant had intercourse with another man at or about the very time the child was presumably begotten, and only three days after she testified that she had intercourse with the defendant. The charge against the defendant was not fornication, but the paternity of the child. Although he had intercourse with the complainant in June, yet if such intercourse did not result in pregnancy, or if the state failed to prove it by a fair preponderance of evidence, the defendant was entitled to an acquittal. If there had been no evidence of her intercourse with any one but defendant, there would have been no difficulty in drawing the conclusion that he was the father of the child. But, if she had exposed herself to the embraces of other men at or about the time she became pregnant, she had placed it out of her power, or that of the jury, to say who was the father of the child. At least,

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if the jury were unable to determine from a preponderance of evidence that defendant was the father of the child, they were bound to find him not guilty, and the court ought to have so instructed them.

There are other assignments of error, but, as there must be a new trial for the reasons already given, it becomes unnecessary to refer to them, except to say that we find no other prejudicial error in the record. Order reversed.

NOTE.—*Witness—Cross-examination.*—Where, on prosecution for bastardy, the prosecuting witness testifies that the defendant is the father of the child, which defendant denies, and on cross-examination she testifies that she never had intercourse with any other man, evidence of intercourse with other men at or about the time testified that the child was begotten is admissible to impeach her. *State v. Perkins*, 117 N. C. 698.

Costs in case of acquittal.—Costs in a bastardy case, in event of an acquittal, can not be taxed against the county; the statute, fixing costs therein, failing to make any one bound therefor in such event, and bastardy being the subject of civil proceeding, so that costs can not be assessed against the county, as in criminal proceedings, and the state or county not being bound for costs, even by legal provisions, unless specifically or by necessary implication named or referred to therein. *State v. Blackburn*, 61 Ark. 407.

Security from pauper convict.—Code, § 1235, authorizing appeal by a convicted pauper without giving security for costs, does not, by requiring an affidavit that he is advised by counsel that he has reasonable ground of appeal, require the name of the advising counsel to be given. *State v. Perkins*, 117 N. C. 698.

WEATHERMAN v. COMMONWEALTH.

(91 Va. 796.)

BILL OF EXCEPTIONS: *Record of proceeding—Signature by judge.*

1. The Code, 1887, requires that the proceedings of court for each day shall be drawn up at large, entered in a book, and read in open court, except on the last day of the term, when they shall be drawn up and read the same day; and that, after being corrected, the record shall be signed by the presiding judge. *Held*, that where the proceedings of the last day of the term are signed by the judge, his failure to sign the orders on the day a verdict of guilty was rendered, will not avoid the verdict and judgment entered thereon.
2. A judge may sign a day's proceedings in the order book at the next term *nunc pro tunc*.
3. The signature by the judge of any day's proceedings in the order book need not be in the presence of one against whom a verdict of guilty was rendered on such day.

W. D. Tompkins and John N. Opie, for plaintiff in error.
R. Taylor Scott, Attorney-General, for the Commonwealth.

RIELY, J. This case is before us upon a rehearing, which was granted upon an assignment of error that was not passed upon in the opinion of the court delivered at the June term, 1894.

We concur in the opinion of the court, delivered by Judge Lacy, upon the former hearing, which affirmed the judgment of the circuit court; and it is only necessary, therefore, to pass upon the single error assigned in the petition for a rehearing.

It appears that the judge of the circuit court omitted to sign, during the term, the orders of the court of the day on which the jury returned their verdict of guilty against the accused, and this is the ground of error on which the petition for the rehearing is based.

It appears from the record that all the steps taken and proceedings had in the trial of the accused on that day, as well as on the other days during which the trial progressed, are wholly regular and in due form, and the only irregularity is the omission of the judge to affix his signature to the record of that day's proceedings. Is this an error for which the judgment of the Circuit Court should be reversed? Section 3114 of the Code is as follows:

"The proceedings of every court shall be entered in a book, and read in open court by the clerk thereof. The proceedings of each day shall be drawn up at large and read during that term, except those of the last day of a term, which shall be drawn up and read the same day. After being corrected, where it is necessary, the record shall be signed by the presiding judge."

The statute does not, in express terms, prescribe that the orders of each day of a term of the court shall be separately signed, but that is the reasonable inference to be deduced from its language, and this is the general practice of the courts. The orders and proceedings of each day in a case are entered by the clerk in the order book under the direction of the court. These entries constitute the evidence of such of the proceedings as have taken place, and such of the orders as have been made by the court during the progress of the trial, as it is necessary should appear in the record, and the signa-

ture of the judge to the record authenticates them and establishes their genuineness. This, we apprehend, is likewise the effect upon all of the proceedings and orders of the term of the signature of the judge to the proceedings of the last day thereof. All entries made in the order book during the term, which precede the signature of the judge, are thereby authenticated. And as the proceedings on the subsequent days, including the last day of the term at which the accused in the case at bar was convicted, were duly signed, the omission of the judge to sign, separately, the record of the proceedings of the day on which the verdict of the jury was returned to the court and recorded, can not invalidate the verdict of the jury or the judgment of the court. No order made by the court or proceeding had in a case during a term, and entered by the clerk in the record book, should be allowed to become invalid or to fail of effect by the omission of the judge, through inadvertence or neglect, to sign the record of the orders and proceedings of the day on which it was made or took place. Judge Staples, in commenting on the statute prior to its amendment, in *Quinn v. Com.*, 20 Grat. 143, said: "But the failure of the judge to comply with the directions of the statute could not impair the rights of the commonwealth, or those of a citizen in the record, as an instrument of evidence, or a muniment of title, or an absolute guaranty against a second prosecution and conviction for an offense already passed upon by a jury. Had the petitioners been acquitted, they could never have been questioned a second time for the same offense, although the judge had failed to sign the record. In the event of such failure, or a refusal on his part to do so, he might be compelled by mandamus to perform that duty."

It is the apparent intention of the statute that each day's proceedings, when read and corrected, where it is necessary (which, under the statute, may be done during the term), should be separately signed; and, while we do not deem this essential to the validity of the proceedings, where the record is signed by the judge at the close of the term, yet there should be no laxity in this respect, but the intention of the statute, for good and obvious reasons, should be rigorously observed and obeyed.

That which was intimated in the quotation from the opinion in *Quinn v. Com.*, *supra*, that where the judge has failed

to sign the record, he might be compelled by mandamus to do so, the judge of the Circuit Court did voluntarily in the case at bar. At the next succeeding term of the court, upon his attention being called to the omission, he then, with the following recorded statement, "Having inadvertently failed to sign this day's orders, and my attention being now for the first time called to the fact of the omission, I now, on this 9th day of November, 1892, sign the same now for then," affixed his signature thereto *nunc pro tunc*. There could certainly be no illegality in doing voluntarily what he could have been compelled to do.

The power of the courts to make entries of judgments and orders *nunc pro tunc* in proper cases, and in furtherance of the ends of justice, has been recognized and exercised from the earliest times; and the period in which the power may be exercised is not limited. Freem. Judgm., § 56; 1 Black, Judgm., §§ 126, 131; 16 Am. & Eng. Enc. Law, 1005, and note thereto; *Mitchell v. Overman*, 103 U. S. 62; and *Allen v. Bradford*, 37 Am. Dec. 689. And this power may be exercised as well in criminal prosecutions, as in civil cases. Freeman on Judgments, note to Sec. 56; and *Burnett v. State*, 65 Am. Dec. 131. If a court would have the right to enter a judgment and authenticate the record thereof now for then, it follows as clearly, as the greater includes the less, the whole a part, that the judge may sign in like manner the record of a judgment rendered, or a proceeding had at a previous term, and duly entered by the clerk upon the order book.

But it is further objected that the orders were signed by the judge in absence of the accused. This was not error. Signing the record of the proceedings of the court was not a step in the prosecution of the accused, or any part of his trial. It was simply the authentication by the signature of the judge of the orders and proceedings that were made and had that day in the trial of the accused, when, as the record clearly shows, he was present in person. There is no error in the judgment of the Circuit Court, and it must be affirmed.

NOTE.—*Power of court to suspend or modify sentence.*—After being sentenced to five years' imprisonment, and serving six days, defendant was brought before the court during the same term, and, on his agreeing to pay into court the costs of prosecution, judgment was suspended. *Held*, that the court had power at a subsequent term, on defendant's failure to pay

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such costs, to sentence him to imprisonment for one year. *State v. Whitt*, 117 N. C. 804.

Mr. Justice Montgomery, commenting on the facts, says: "A court may suspend judgment upon the understanding that a defendant will compensate an injured party by payment of money, but it adds no force to such a condition to make it a matter of record. The collection of such damages can not be enforced by imprisonment without coming in conflict with the constitutional inhibition against imprisonment for debt. When a judgment has been suspended on the agreement of the defendant to pay the costs, and the costs have not been paid, the judgment may be enforced for such failure." *State v. Crook*, 115 N. C. 760.

For an exhaustive review of the authorities in respect to the power of courts, including the right of a person to be released from imprisonment on *habeas corpus*, see *People ex rel. Gilbert v. James Pease, Sheriff*, *Chl. Law Journal*, 1895, p. 243.

STATE V. CALLAHAN.

(47 La. Ann. 444.)

BRIBERY: *Testimony of accomplice—Corroboration—Evidence of truthfulness—Construction of statute—Alternative offenses.*

1. The circumstance of an accomplice having told the truth about irrelevant and immaterial things, which have no tendency to confirm the material parts of his testimony involving the guilt of the accused, is not admissible in evidence for the purpose of sustaining the veracity of such accomplice, notwithstanding a further basis has been laid for his impeachment.

When a criminal statute contains separate and distinct denunciations against two separate and distinct classes of offenders, in the alternative, in one continuous and unbroken sentence, such statute must receive such construction as to give effect to all of its provisions, in the sense evidently intended by the Legislature in its enactment. *Nicholls, C. J., and Breaux, J., dissenting.*

Appeal from Criminal District Court, Parish of Orleans;
James C. Moise, Judge.

John T. Callahan was convicted of having received a bribe as a member of a city council, and appeals. Reversed.

C. H. & C. C. Luzenberg, A. D. Henriques, James C. Walker and Evans & Dunn, for defendant and appellant.

M. J. Cunningham, Attorney-General, *Charles A. Butler*, District Attorney, and *John J. Finney*, Assistant District Attorney, and *Lionel Adams* for the State.

WATKINS, J. The defendant was convicted of the crime of having received a bribe within the meaning of the bribery statute of 1890, and prosecutes this appeal from a sentence to five years' imprisonment at hard labor in the state penitentiary.

The charge of the indictment is that the defendant, being a member of the Common Council of the city of New Orleans, and, as such, a municipal officer thereof, on the 7th of November, 1893, feloniously did receive from one Lyman S. Widney the sum of \$500 as a bribe, present, or reward, for the purpose of influencing him, as such officer, to vote and exercise the power in him vested, and to perform a duty of him required, with partiality and favor. During the progress of the trial quite a number of bills of exception were taken on the part of the defendant to various rulings of the trial judge, to which we will give our attention in the order of their occurrence and importance.

The first question in importance, and to which the counsel on either side have devoted their arguments chiefly, is that which relates to the admission in evidence of the check and stub of the check in the check book, and the entries made by the book-keeper in the cash book, of the Pennsylvania Coal Company, of which Lyman S. Widney was agent.

This question became, in due course of proceedings, the subject of three bills of exception, which are numbered in the transcript, respectively, 5, 6, and 7, all of which are, by the State's counsel, cumulated, and argued in their brief, collectively.

L. S. Widney being on the stand at the instance of the State, and on cross-examination by the defendant's counsel, the basis having been laid for his impeachment, counsel for the State handed to him the aforesaid check book, and asked him if the item exhibited to him was the stub entry for the check of \$500 mentioned in his testimony, as having been drawn for the purpose of getting the money that was paid to the defendant. To this, counsel for the defendant objected, because the offer was of a stub of a check book kept by Widney himself, and of which the defendant had no knowledge, and was not a party thereto; and further, because this was not the proper subject-matter for re-examination.

This objection having been overruled by the court, and the testimony admitted, the defendant retained the bill of excep-

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tions No. 5. The ruling of the court on this question was as follows, viz.: "I regarded the check and stub as part of the *res gestæ*. I make a distinction, in this respect, between the check and stub and the entries in the books, as eight days had elapsed from the drawing of the check up to the entry in his books, which was made November 15th," etc.

On the further re-examination of Widney, counsel for the State asked him if he did not direct an entry of the payment of \$500 on the books of the coal company on the 15th of November, and to that question, and the answer proposed, defendant objected that any entry that Widney would make, or cause to be made, on his books, was his own act.

To this objection counsel for the State replied that, inasmuch as defendant's counsel had laid a basis for the contradiction of Widney, it was then competent for the State to corroborate him.

The objection having been overruled, and the trial judge having admitted the testimony, the defendant's counsel retained the bill of exceptions No. 6.

As the ruling of the court is the same on bill of exceptions No. 7, reference to it will be, for the present, deferred.

Thereupon, counsel for the State offered the entry in the cash book of the coal company in evidence; that is to say, the entry of the 15th of November, 1893, which was referred to by Widney, as having been made under his instructions, viz.: "Check marked in red ink '93,' dated November 15th. B. D. Wood and Sons, City Council, \$250.00. Improvements, \$250.00."

In the course of the interrogation that followed, it was disclosed that the writing on the stub of the check was in the hand of Widney, and the entry in the cash book was in the handwriting of the book-keeper of the coal company, as well as the red marks on the stub.

William Cruzat, book-keeper of the coal company, was called as a witness for the State, and was interrogated with the view and for the purpose of corroborating Widney, and in the course of his interrogation, answered that the entries in the cash book were made by him under the directions of Widney, as agent of the coal company. Thereupon counsel for the State offered in evidence the cash book and ledger of the coal company, and the aforesaid entries therein of date November 15, 1893, to which the defendant objected, because the entries

were made therein out of defendant's presence, and without his knowledge; and further, because Widney could not be corroborated by his own books, and by entries made in them in pursuance of his instructions, and without the presence or knowledge of the defendant.

These objections having been overruled, and the testimony admitted, defendant's counsel retained the bill of exceptions No. 7.

Thereupon counsel for the State proceeded to examine the witness Cruzat, with reference to said entries, etc.

From the testimony of Widney, as well as from the check, stub, and check book, it appears that \$500 were withdrawn from bank on the 7th of November, 1893—the date laid in the indictment—and paid to the defendant on that date; and that the payment closed the transaction, in so far as the defendant was concerned, and in so far as the commission of the crime of bribery is concerned.

And, from the testimony of Cruzat, the book-keeper of the coal company, as well as from the entries in the cash book and ledger, it appears that he never dealt with the check at all, nor with the stub in the check book, otherwise than as directed by Widney. It further appears that Cruzat was, at the time the check was drawn and the money paid to the defendant, by Widney directed not to make any entry thereof in the books of the coal company at all, but to wait a few days; and that on the 15th day of November, 1893,—eight days after the payment was made to the defendant, and the transaction closed,—he was, by Widney, further directed to make the entry as it occurs on the cash book, and that he made same according to his directions.

Inasmuch as the reasons of the trial judge for overruling the defendant's objections to the foregoing testimony, and those appended to the aforesaid last two bills of exception, are very succinctly stated, we will incorporate them in their entirety, and take the liberty of extracting same from the brief of counsel for the State. They are as follows, namely:

"And be it further remembered that the foregoing evidence and the testimony of the witness Lyman S. Widney, a witness for the State, with the objections and exceptions reserved to the ruling of the court, are herein set forth with particularity,

and are taken from the stenographer's notes kept and taken at the time said evidence was given by the said witness.

"And now the defendant, by his said counsel, tender this, their bill of exceptions, for signature, and pray that the same be filed, and made part of the record."

PER CURIAM. "I make part of this bill the written reasons on file for admitting the evidence, the statements of facts contained therein, the testimony of L. S. Widney and Wm. Cruzat, check book stub No. 512, of November 7th, check No. 512, for \$500, by the Pennsylvania Coal Co., on the Louisiana National Bank, and the entries in the books of the Pennsylvania Coal Co., to which objections have been made, and which are the subjects of this bill.

"The entries were not offered for the purpose of corroborating the testimony of an accomplice as to those facts which fix the guilt of an accused by identifying and connecting him with the commission of the crime, but for the purpose of confirming the witness' narrative of facts, so far as possible, in all of its parts in order to sustain his veracity, which had been assailed in the manner stated in the written reasons filed at the time, and referred to above as made part hereof.

"The evidence was admitted at that time, before the prosecution closed, in order to protect the State in case the accused should submit his case without offering any evidence, after having assailed the veracity of the State's only witness to the most material and essential fact of the case. In such a contingency, should the cause go to the jury on the uncorroborated testimony of an accomplice, and the veracity of this witness had been attacked in such a way as to suggest a slight, yet reasonable possibility that his statements may be untrue, this might create such a doubt in the minds of the jury as would prevent them from basing a verdict upon such testimony, and the cause of the State be irretrievably crippled. As a matter of fact such a contingency did arise, as the defense submitted their case without offering any evidence whatever on the merits.

"Before admitting the entries they were examined, and found to contain no recital which had even the semblance of a tendency to identify or connect the accused, Callahan, with the receipt of the money. They did tend to confirm Widney's statements as to the following facts:

"First, as to the statement that he withdrew the sum of five hundred dollars from the business of the Pennsylvania Coal Co. See his answers to questions Nos. 351, 352, 370, 371, 372, 374, 375, 450, and 471. They did not confirm him as to what he did with the money after it was withdrawn.

"Second, as to Wood's interest in the transfer of the privilege, and his agreement to pay one-half. See answers to questions Nos. 48, 52, 54, 82, 83, 84, 85, 86, 619, 620, 621.

"Third, that this agreement was carried out; that Mr. Widney advanced the money, and Wood was to return one-half, and it was so charged. See questions and answers 63, 64, 65, 351, 352, 364 to 375, inclusive; 499, 461, to 471 inclusive; 499, 82, 83, 85, 86, 619, 620, 621. It did not confirm him as to the manner of payment, nor the identity of the recipient, but merely as to the fact of payment, and Wood's responsibility for one-half.

"Fourth, as to all these statements and conclusions from which were that Wood was his accomplice. See questions and answers Nos. 15, 29, 35 to 56, inclusive; 328 to 333, inclusive, and 503.

"Fifth, as to the fact that an entry on the book had been made of the transaction; that is, that the \$500 had been accounted for. See questions and answers 86 to 94, inclusive, 588, 590, 591; that the entries were made November 15th, as sworn to by him in answer to question 588; that they were made under his instructions to Mr. Cruzat, his book-keeper, as sworn to in answers 588, 590, and 591. See, also, Cruzat's testimony, Nos. 87½ to 93, inclusive.

"Sixth, as to the fact that he was manager of the Pennsylvania Coal Co., since he had the power to draw funds from their business, and to direct the book-keeper what entries to make in relation to them, and under no obligation to reveal the facts and details of the transaction. See answers 2, 3, 5, 87½ to 93, inclusive, 146, 147, 149, 150, 588, 590, 591, 424. See, also, Cruzat's testimony, questions and answers 7 to 16, inclusive, 38, 39, 42, 45, 46, 47. See, also, Judge Walker's statement (of counsel for defendant) in Cruzat's testimony that all entries were made under instructions and directions of Mr. Widney.

"Seventh, they tended to confirm his sworn statements as to concealment of the transaction—concealing the details from

every one, even his book-keeper. See questions and answers 407 to 430, inclusive, 622 to 628, inclusive. See, also, Cruzat's testimony, 7 to 16, inclusive.

"In conclusion, I regarded those entries in the nature of statements—written statements—made out of court, at a time unsuspecting, in due course of business, and admissible to show that they involved a condition of things conforming to the witness' sworn testimony at the trial.

[Signed] "JAMES C. MOISE, Judge."

With regard to the admissibility of the check and the stub as constituting part of the *res gestæ*, we are of opinion that the ruling of the trial judge was undoubtedly correct. They were contemporaneous in date with the principal transaction—that is, the payment of the money to the defendant—constitute a part of it, and illustrate its character. Hence they were properly admitted in evidence.

But with regard to the admissibility of the entries in the books of the coal company, and the parol testimony of Widney and Cruzat in respect to those entries, quite a difficult question arises, because Widney had directed those entries to be made by Cruzat in the absence and without the knowledge of the defendant eight days after the transaction was closed.

This is shown by the statement of the trial judge in his reasons for admitting the testimony, viz.: "Before admitting the entries they were examined, and found to contain no recital which had even the semblance of a tendency to identify or connect the accused, Callahan, with the receipt of the money.

"They did tend to confirm Widney's statements as to the following facts," etc.

It is therefore evident that the judge did not consider these entries a part of the *res gestæ*. He did not put his ruling on that ground, for he distinctly states that the testimony was admitted "for the purpose of confirming the witness' [Widney's] narrative of facts as far as possible, in all its parts, in order to sustain his veracity, which had been assailed in the manner stated in the written reasons filed at the time and referred to above, and made part hereof." (Our italics.)

He finally states that he "regarded these entries in the nature of statements—written statements—made out of court,

at a time unsuspecting, in the due course of business, and admissible to show that they involve a condition of things conforming to the witness' sworn testimony at the trial."

We further extract from the brief of counsel for the State "the reasons of court for admitting books in evidence attached to bill No. 6." They are as follows, viz.:

"REASONS OF COURT FOR ADMITTING BOOKS IN EVIDENCE, ATTACHED TO BILL NO. 6.

"On August 17, 1894, on the trial of this case, the State sought to introduce in evidence certain entries made upon the books of witness L. S. Widney, for the purpose, as announced, of corroborating the testimony of said witness, when such testimony had not yet been assailed. I asked counsel should not such evidence, if admissible, be properly offered in rebuttal. The suggestion involved in this question did not meet with acceptance upon the part of counsel, and he urged his offer, arguing its admissibility. It was contended that the witness was an accomplice of the prisoners, and his testimony should be corroborated. It was ruled inadmissible. An accomplice being a competent witness, if credit be given his testimony it would require no confirmation from other evidence. The rule of law in this State is, a jury may convict on the uncorroborated testimony of an accomplice. *State v. Cook*, 20 La. Ann. 145; *State v. Bayonne*, 23 La. Ann. 78; *State v. Prudhomme*, 25 La. Ann. 522; *State v. Crowley*, 33 La. Ann. 782; *State v. Russell*, Id. 138; *State v. Mason*, 33 La. Ann. 476; *State v. Hamilton*, 35 La. Ann. 1043.

"In Russell's case, 33 La. Ann. 136, our Supreme Court held the following charge to the jury in the Prudhomme case, 25 La. Ann. 522, to be correct. 'The jury may convict on the uncorroborated testimony of an accomplice. They are the judges of his credibility, and the rule requiring the judge to charge the jury that the testimony of any accomplice needs confirmation is a rule of practice, rather than a rule of law.' And they say further: 'The rule requiring corroboration is a rule not of law, but of general and useful practice, the application of which is for the discretion of the judge by whom the case is tried, and in its application much depends on the nature of the offense and the witness' complicity.'

"The rule as to the character of corroborative evidence in

the case of accomplices is thus laid down by Russell on Crimes (volume 3 [9th Ed.], p. 603):

“‘There is a great difference between confirmations as to the circumstances of the felony and those which apply to the individual charged; the former only proves that the accomplice was present at the offense; the latter shows that the prisoner was connected with it. This distinction ought always to be attended to. Wilkes and Edwards were charged with stealing a lamb, and an accomplice proved the case against both the prisoners, and stated that they threw the skin of the lamb into a whirley hole, the situation of which he described, and a constable proved that he found the skin in the whirley hole. A quantity of meat was found of a kind corresponding with that of the stolen lamb in the house of Edwards, but could not be positively identified, and a witness proved that Wilkes had come to him to borrow a pair of shears, and had then made a statement to him to the same effect as the evidence of the accomplice. Alderson, B., said in summing up: “The confirmation of the accomplice as to the commission of the felony was no confirmation at all, because it would be a confirmation as much as if the accusation were against you and me, as it would be to those prisoners who are now upon their trial. The confirmation which I always require juries to require is a confirmation of some fact which goes to fix the guilt upon the particular person charged.”’ (Italics are the court’s.)

“‘The corroboration,’ says the same author (page 602), ‘must not only connect the prisoner and the accomplice together, but must be such as to show that the prisoner was engaged in the transaction which forms the subject-matter of the charge under investigation.’ And after giving the facts of the case cited (*Reg. v. Furler*, M. S. S. C. G., 8 C. & P. 106 (34 E. C. L. R.)) quotes Lord Abinger, as follows:

“‘Now, in my opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself, will always be able to relate the facts of the case; and if the confirmation be only of the truth of that history, without identifying the persons, that is really no corroboration at all.’ See the many cases cited in illustration in 3 Russ. Crimes (9th Ed.), pp. 599–611, inclusive.

“Therefore, if such evidence is not confirmatory in its

nature it is logically irrelevant; but it has never been considered sufficiently disconnected with the main issue to warrant its exclusion on that ground.

"In the many cases cited, the evidence went to the jury subject to the charge of the court on its effect, but in every instance it was the testimony of a third person as to the same fact testified to by the accomplice, and not a prior statement of the accomplice, oral or written, in substantiation of his own testimony, and thus amenable to another legal objection positively justifying its exclusion.

"Viewing the case at bar in the light of these principles, proof of the fact that an entry had been made in the books of Mr. Widney as to the withdrawal of five hundred dollars from his business on the date stated could not be objectionable, but to admit in evidence the entries themselves, so that their recitals would be proof against the prisoner, and binding upon and identifying him as the party who received the money, when it was not shown that he was present when the entries were made, or when Mr. Widney directed his book-keeper to make them, or that he was aware that they were made, would be contrary to the elementary principles of evidence.

"It would be competent to prove the withdrawal of funds from a business, or the withdrawal or delivery of goods from a stock of merchandise, or prove any other such facts in the due course of business, by such entries, under certain conditions, but they are not admissible to fix the identity of a person under the circumstances of this case as to his complicity in the crime charged.

"There must have been some evidence, as a foundation, to connect Callahan with the particular entries sought to be introduced in evidence. This position appears to me to have greater force when the evidence was offered, not to prove an independent, substantive, relevant fact by a third person in corroboration of the accomplice's testimony, but to corroborate him by his prior statements in his books when his testimony has not been assailed.

"Since this ruling the witness has been cross-examined and turned over to the State for redirect examination. The prosecution again offers the books in evidence for the purpose of substantiating the witness' testimony, it having been positively attacked. It is claimed the situation has now materially

changed, since a basis has been laid for the introduction of this evidence by the assault upon the witness' veracity.

"On the cross-examination there was a very strong effort made to weaken the testimony of the witness by the most searching interrogatories. The examiner announced in open court, in the presence of the jury, that the defense intended to prove that Callahan was not present at Widney's office, as testified to by the latter; in other words, to prove an alibi. This announcement questions the truth of every fact sworn to by the witness in relation to Callahan's visit to his office. He also laid the foundation for impeaching the testimony of the witness by propounding the necessary questions and summoning a witness for the purpose of contradiction.

"He is, therefore, to be impeached and contradicted as to material facts in the case, and particularly as to what had taken place at his office at the time he paid Callahan, and under the circumstances stated. If this testimony in support of the witness Widney were not admitted, the State would be left in a crippled condition, without an opportunity of repairing it, should the case be submitted. This was the ground for the ruling in the case of *State v. Fruge*, 44 La. Ann. 165.

"An attack having been made upon the veracity of the prosecuting witness, it is competent for the State to sustain his statements by every corroborating fact coincident with the history of the case as testified to by him. It makes no difference whether or not such confirmation have a direct or indirect tendency to implicate the prisoner in the commission of the crime. It is relevant, in order to sustain his truth, which has been called in question; to corroborate his narrative of the facts, which it has been sought to break down. I think this case, in principle, strictly parallel with that of *Com. v. Wilson*, 1 Gray, 138; *State v. Boyd*, 38 La. Ann. 374; 1 Greenl. Ev. § 469; *Turnpike Co. v. Heil*, 118 Ind. 136.

"In a prosecution for rape, if the prosecutrix, having been admitted to testify that she made a complaint immediately after the fact, is impeached as to the fact of this complaint, she may be supported by proving she has, out of court, narrated the facts as testified to by her at the trial. *Thompson v. State*, 38 Ind. 39.

"I think it has been distinctly developed by the defense that fraud is to be attributed to Widney and that he never paid the

sum charged to the prisoner at the bar. If fraud or improper conduct be imputed to the witness, the supporting evidence will be admitted. 1 Greenl. on Ev. (15th Ed.), pp. 621, 622, note c, citing *Annesley v. Anglessea*, 17 How. State Tr. 1348. "For these reasons I rule the evidence admissible."

From the foregoing we have it affirmed by the trial judge that these entries were not offered for the purpose of corroborating the testimony of an accomplice as to those facts which fix the guilt of an accused by identifying and connecting him with the commission of the crime. That at a prior stage of the trial, and before a basis had been laid for Widney's contradiction, these entries had been offered on the part of the State, and rejected on the ground that to admit them as binding on the defendant, and identifying him as the party who received the money when it was not shown that he was present when the entries were made, "would be contrary to the elementary principles of evidence." That these entries were admitted over objection, after the basis had been laid for Widney's impeachment for the purpose of corroborating his narrative of facts and to sustain his veracity. That since the credibility of Widney has been attacked the situation has materially changed, and the entries have become competent evidence, though inadmissible before it was attacked; and "that it makes no difference whether or not such confirmation has a direct or indirect tendency to implicate the prisoner in the commission of the crime."

That this affirmation of the trial judge be fully enforced, we make the following extracts from the brief of counsel for the State:

"The error into which the astute counsel representing this defendant have fallen, grows out of the assumption that the only corroboration of a witness who happens to be an accomplice which the law will permit is a corroboration as to those parts of his statement exclusively, which tend to connect the defendant with the crime charged.

"Their constant announcement of the rule was, that unless the testimony offered in corroboration had the tendency to prove some fact connecting the defendant with the crime charged, or to show any participation of the defendant with the accomplice at any stage of the transaction, it should have been scrupulously excluded.

"As written in the record, the history of the case establishes that the very character of testimony which was here objected to had previously been offered on behalf of the prosecution for the avowed purpose of corroborating the accomplice, Widney, and that when thus offered it was unhesitatingly rejected by the court as inadmissible for that purpose, because it did not amount to a confirmation of some fact which tended to fix upon the defendant the commission of the crime charged in the indictment. * * *

"It is therefore obvious that the District Judge was in full accord with the defendant's counsel in holding that the confirmation of an accomplice which is required must not only connect the prisoner and the accomplice together, but must be such as to show that the prisoner was engaged in the transaction which forms the subject-matter of the charge under investigation.

"The evidence, however, was offered and admitted at the trial for an entirely different and distinct purpose. It was not introduced with a view to corroborate the testimony of an accomplice as to some material fact in order that the jury might be justified in convicting upon his testimony, but was offered for the purpose of supporting those of his statements which had been impeached by the opposing counsel, who had imputed to him improper motives, and a recent fabrication of his account of the transaction by showing prior similar statements made by him before such bias or motive could have influenced his declarations."

Counsel for the State then formulate the following propositions, and state their authorities thus:

"Besides these cases, there are also others where the supporting testimony is permitted solely because of the nature of the peculiar circumstances which exist. In this latter class of cases the impeached witness is not sustained by general evidence of his good character for truth and veracity, but by proof that at a time not suspicious he made a prior similar statement to the one, the truthfulness of which has been assailed. Therefore it is now laid down as a maxim of the law that where evidence has been offered tending to show bias, improper motive, or recent fabrication on the part of a witness calculated to account for the testimony given, then prior similar statements, made before such bias or motive could have

actuated the witness, may be given on redirect examination or in rebuttal. Best's Prin. Ev. p. 633, note under subhead 'Corroborating Statements;' *People v. Doyell*, 48 Cal. 85; *Thompson v. State*, 38 Ind. 39; *Robb v. Hackley*, 23 Wend. 50; *Hayes v. Cheatham*, 6 Lea. (Tenn.) 1, 10; *Stelph v. Blair*, 68 Ill. 241. See *Henderson v. Jones*, 10 Serg. & R. 322; *State v. George*, 8 Ired. (N. C.) 324; *Dossett v. Miller*, 3 Sneed, 72."

From the foregoing we have the proposition that the entries in the books, made under the direction of Widney, an accomplice, were inadmissible for the purpose of corroborating his statements of fact fixing the guilt of the defendant; but that when a basis had been laid by defendant for his impeachment, they became admissible, as a previous consistent statement for the purpose of sustaining his veracity. Or, put in other words, it is that laying the basis for the impeachment of an accomplice constitutes him a witness, entitling him to all the privileges and immunities of a witness; that is to say, that an accomplice being, in contemplation of law, a person unworthy of credit, and whose testimony requires some confirmation to entitle same to full faith and credit, is relieved from this disability the moment a further direct attack upon his credibility is made; and *eo instanti* he becomes elevated to the plane of a trustworthy and credible witness.

It would seem that a legitimate deduction from that statement would lead to the opposite view. But, if this theory be correct, the distinction that is taken between witness and accomplice would appear to be more seeming than real.

That Widney is an accomplice of the defendant appears on the face of the indictment, and on the face of the statute under which the indictment was found, Sec. 1, Act 78 of 1890. That section of the statute is couched in the same phraseology as the 173d article of the constitution.

The trial judge recognized and treated him as an accomplice in his rulings in this case.

Vide opinion and rulings above quoted.

That we be under no misapprehension with regard to the legal status of an accomplice who is placed upon the witness stand to testify in behalf of the State, let us look into the authorities on the subject, and see how they stand.

In *Com. v. Bosworth*, 22 Pick. 397, the Massachusetts court stated the rule thus:

"But the source of this evidence is so corrupt that it is always looked upon with suspicion and jealousy, and is deemed unsafe to rely upon without confirmation."

And in treating of what confirmation is requisite, the court said :

"We think the rule is that the corroborative evidence must relate to some portion of the testimony which is material to the issue. To prove that an accomplice had told the truth in relation to irrelevant and immaterial matters, which were known to everybody, would have no tendency to confirm his testimony involving the guilt of the party on trial."

That decision has been since adhered to and affirmed in that court in the following cases, viz.: *Com. v. Larrabee*, 99 Mass. 413; *Com. v. Elliot*, 110 Mass. 104; *Com. v. Snow*, 111 Mass. 411; *Com. v. Scott*, 123 Mass. 222; *Com. v. Holmes*, 127 Mass. 424.

And the same rule has been adhered to and followed in the courts of other States. *Vide State v. Wolcott*, 21 Conn. 272.

The Georgia court states the proposition thus :

"There is absolutely no evidence corroborating the accomplice, Thurman, in the sense of the law. We decided in the case of *Childers v. State*, 52 Ga. 106, that the corroborating circumstances must be such as connect the prisoner in some way with the crime. * * *

"That the conviction in the case at bar is based solely on the testimony of Thurman. There are circumstances going to show he is guilty, other than what he states, but absolutely none that the prisoners are. * * *

"That (the accomplice) told the same tale when arrested is not only no corroboration by any matter connecting the prisoners with the crime, but it is illegal testimony any way.

"It is strange to bolster up a witness by proof that he has told the same story before. We know of no authority for such a practice." *Middleton v. State*, 52 Ga. 527.

The Pennsylvania court states the rule thus :

"It is almost the universal opinion that the testimony of an accomplice should be corroborated as to the person of the prisoner against whom he speaks. Some fact should be proved by testimony independent of the accomplice, which, taken by itself, leads to the inference, not only that a crime has been committed, but that the prisoner was implicated in it. To

prove that the accomplice had told the truth in reference to irrelevant and immaterial matters * * * would have no tendency to confirm his testimony involving the guilt of the party on trial." *Watson v. Com.*, 95 Pa. St. 424.

The California court pronounced the rule thus :

"The acts of an accomplice are not evidence against the accused unless they constitute a part of the *res gestæ*, and occur during the pendency of the criminal enterprise, and are in furtherance of its objects." *People v. Moore*, 45 Cal. 19; *People v. Stanley*, 47 Cal. 113.

The Missouri court quotes with approval the rule as announced in *Reg. v. Farler*, 8 Car. & P. 106, to wit :

"It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice unless the accomplice is corroborated in some material circumstance.

"Now, in my opinion, the corroboration ought to consist of some circumstance that affects the identity of the accused. A man who has been guilty of a crime himself, will always be able to relate the facts of the case; and if the confirmation be only of the truth of that history, without identifying the persons, that is really no corroboration at all." *State v. Chioykh*, 92 Mo. 395.

The foregoing extracts have been selected as pertinent to the question at issue, and as illustrative of the consensus of the best judicial opinion on the subject; and we also refer to the following decisions, without quoting from them, as being equally decisive and authoritative: *People v. Elliott*, 5 N. Y. 204; *Boyce v. People*, 55 N. Y. 645; *Armstrong v. People*, 70 N. Y. 38; *People v. Plath*, 100 N. Y. 593; *Coleman v. State*, 44 Tex. 109; *State v. Thornton*, 26 Iowa, 80; *Lampkin v. State*, 68 Ala. 56; *Ross v. State*, 74 Ala. 532.

Nor is this so only of the adjudications of the other States of the Union, but like principles are announced by all text writers, of which we cite the following, viz.: 3 Rice, Cr. Ev., § 325; 1 Greenl. Ev. (14 Ed.), § 381, and note; 1 Phil. Ev., pp. 30, 38, 112; 2 Russ. on Crimes, pp. 396, 956, 967, 968; 2 Starkie, Ev., pp. 11, 12; 1 Rosc. Cr. Ev., pp. 120, 133, 155, 160; 1 Hale, P. C., p. 305; Whart. Cr. Prac. (9th Ed.), §§ 442, 481, 490.

Mr. Bishop puts the proposition thus tersely: "Nor does

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the testimony of one accomplice confirm another." 1 Bish. Cr. Proc., § 1170.

Joy, Lord Chief Baron of the exchequer of Ireland, says: "Besides, those circumstances were deposed to by the accomplices themselves, and it is the first time I ever heard that an accomplice can corroborate himself by the circumstances which he swears to." Joy's Evidence, Accomplices, p. 35.

Recognizing these established principles, we held in a recent case that all the decisions and authors concur in the opinion that the testimony of an accomplice can not be confirmed, except "by evidence from a purer source." *State v. Mason*, 38 Ann. 476.

That decision is in strict keeping with prior and subsequent opinions of this court. *State v. Banks*, 40 Ann. 736; *State v. Hamilton*, 35 Ann. 1043; *State v. Russell*, 33 Ann. 136; *State v. Prudhomme*, 25 Ann. 532; *State v. Bayonne*, 23 Ann. 78; *State v. Cook*, 20 Ann. 145.

The trial judge recognized this rule of jurisprudence when he rejected and disallowed in evidence the entries in the books of the coal company on the ground that to admit them as binding on the defendant, and identifying him as the party who received the money, when it was not shown that he was present when the entries were made, "would be contrary to the elementary principles of evidence." But when a basis had been laid for a specific impeachment of Widney's general character for truthfulness, the judge was of opinion, and so ruled, that the situation was, on that account, materially changed, and the rejected entries had become admissible evidence, "whether or not such confirmation has a direct or indirect tendency to implicate the prisoner in the commission of the crime."

Entertaining this view, he permitted the entries introduced on behalf of the State for the purpose of corroborating Widney's previous narration of facts and of sustaining his veracity.

If this ruling be correct, and must be sustained by this court, it is because an accomplice loses his character as such, and becomes a witness, as soon as a basis is laid for his impeachment.

To thus hold and decide would be equivalent to saying that a person who is unworthy of credit, and whose testimony needs corroboration to entitle it to full faith and credit, is relieved

from that disability as soon as further formal assault is made upon his veracity, entitling him to the privileges and immunities of a credible and trustworthy witness.

We have been furnished with neither authority nor precedent for that proposition; nor have we been able, after most industrious examination of adjudicated cases and text-books, to find any precept sustaining it.

The only cases cited by the trial judge as sustaining that view are *State v. Boyd*, 38 La. Ann. 374, and *Com. v. Wilson*, 1 Gray, 133.

In our opinion, neither of those cases have any application to the question under consideration, as they simply state the rule applicable to ordinary witnesses, and make no reference to accomplices.

In the case of *State v. Banks*, 40 La. Ann. 736, there was no question of the impeachment of either witness or accomplice. The accomplice had testified that the defendant had told him "where he had procured the ax with which the homicide had been committed;" and another witness testified, in corroboration of that statement, that the accomplice "had shown him the place where the homicide had been committed, and the spot where the body of the victim had been found." The court properly held this testimony admissible for the purpose of corroborating the testimony of the accomplice; but it was admissible for the reason that it tended directly to establish the guilt of the defendant, and because it was the statement of a third person, disconnected with the case.

Even with reference to the admissibility of circumstantial evidence to sustain the veracity of an ordinary witness, on the part of the State, the most recent opinion of this court is adverse to the theory entertained by the trial judge, for in *State v. Guillory*, 45 La. Ann. 31, the following occurs:

"The trial judge assigns as his reasons for permitting the testimony to be introduced, first, that it was in corroboration of the testimony of one of the witnesses for the State, who had testified that he saw Ambrose Guillory hand a pistol to the accused when the quarrel began; second, that the testimony of said witness was the subject of an attempt by the defense, to impeach and contradict him on that point.

"These reasons," say the court, "are in our opinion insufficient to justify the radical departure from elementary princi-

ples, in permitting hearsay testimony as a part of the affirmative evidence on the part of the prosecution. The judge's ruling was clearly erroneous, and the accused is entitled to relief."

In our opinion it is a contradiction in terms to treat of the impeachment of an accomplice, in view of the fact that being an accomplice attaches to his testimony such a degree of suspicion and jealousy that it is deemed unsafe for a jury to rely upon it without confirmation. The very object of impeachment is to discredit a witness; and if the statement of a witness is already discredited, by reason of his being an accomplice, it would seem to be the work of supererogation to administer additional testimony looking to his impeachment. This principle was affirmed in *People v. Vane*, 12 Wend. 78, in which the New York court say that "the witness stands impeached by the direct testimony given by himself, as in the present case. The witness shows on his direct examination that he was an accomplice; his testimony is therefore suspicious. It comes from a tainted source, and may well be doubted. In such case, it seems to me, the principle applies that a witness who has been impeached may be supported."

And Mr. Thompson, in his treatise on Trials, in announcing the same principle, says: "It has been reasoned that when the witness is an accomplice, this fact alone is an attack upon his credibility," etc. 1 Thomp. on Trials, p. 466, § 549.

To the same effect is *State v. Twitty*, 2 Hawks (N. C.), 449, and other cases in that court. And, inasmuch as testimony corroborative of the testimony of an accomplice must tend to establish the guilt of the accused, it would seem to be incompatible with both the reason and spirit of the rule to permit the introduction of any other character or species of testimony to sustain his general character for truthfulness because of an effort to further impeach his credibility.

The whole question seems to be completely covered by the opinion in the Massachusetts court, in *Com. v. Bosworth*, 22 Pick. 37.

In that case the testimony of an accomplice was the sole reliance of the prosecution. The district attorney sought to corroborate his testimony by that of other witnesses, and this was permitted over objection of defendant's counsel.

"For the purpose of impeaching the testimony of the accomplice," says the report, "the defendant introduced a letter from

him (the accomplice) to the defendant, in which he admitted that his testimony in relation to this case, on a former occasion, was false. * * *

"The District Attorney, in order to corroborate the testimony of the accomplice, for the purpose of supporting his general credit, then called the sheriff and jailer to prove that the situation of the rooms and the arrangement of the prisoners therein correspond with the account given by the accomplice. To the admission of this evidence the defendant objected, but the court overruled the objection, and admitted the evidence."

So that it is apparent that that case presents the identical question that confronts us in the instant case.

The court, first reciting the rule that is announced *supra*, to wit, "that the corroborative evidence must relate to some portion of the testimony which is material to the issue," held that it was not competent "to prove that an accomplice had told the truth in relation to irrelevant and immaterial matters," etc. And with regard to the attempted impeachment and the effort of the State to sustain his veracity, the court say further:

"We can not perceive how the circumstance that the witness told the truth about these public and common objects, concerning which he knew that proof was at hand, has any tendency to confirm the material parts of his testimony involving the guilt of the defendant."

That opinion is perfectly conclusive and irresistible to the effect that the testimony of an accomplice, whose veracity has been specially impeached, can not be sustained by any species of testimony that has no tendency to confirm the material parts of his evidence involving the guilt of the defendant.

Nearly fifty years after that opinion was announced it was again examined and affirmed by the same court in *Com. v. Holmes*, 127 Mass. 424, Mr. Justice Gray being the organ of the court. The court style the Bosworth case as "the leading case in this court on the subject;" and making a lengthy quotation therefrom, they affirm it on both propositions. Since that time the doctrine of the Bosworth case has stood unquestioned, and has been cited as authoritative by all subsequent text-writers.

In our opinion the principle on which the doctrine is founded is correct and fundamental, and, accepting same as correct, our

conclusion is that the learned judge of the trial court improperly permitted the introduction in evidence of the entries in the books of the Pennsylvania Coal Company over the defendant's objection, and that thus admitting same was reversible error.

Having reached this conclusion, it becomes our duty to dispose of the defendant's motion in arrest of judgment, which, in substance, presents the same question as that which was made the subject of discussion by counsel for the defendant, and figures in one of defendant's bills of exceptions—the bill of exceptions which covers the ruling of the court on this question being No. 19.

The motion in arrest of judgment is couched in these words:

"Sixth. Because the indictment fails to charge that the defendant was an officer or member of the General Assembly at the time it is charged he received said sum of five hundred dollars."

As stating the construction of the statute most favorable to the defendant, we have selected and appended thereto, the paraphrase of section 1 of Act No. 78 of 1890, which is drawn in question by the motion in arrest, which is as follows, viz.:

"Any person who shall directly or indirectly offer or give any sum of money, bribe, present or reward * * * to any officer, State, parochial or municipal * * * or to any member or officer of the General Assembly * * * with intent to induce such officer or member of the General Assembly * * * to perform any duty of him required with partiality or favor * * * the person giving or offering to give * * * and the officer or member of the General Assembly so receiving * * * any money, bribe, present or reward * * * with the intent, or for the purpose or consideration aforesaid, shall be guilty of bribery."

It is quite true that the present indictment is founded upon the latter denunciation of the statute, namely, "the officer or member of the General Assembly so receiving * * * any money," etc., yet it is distinctly and immediately connected with the former denunciation of the same section of the statute.

"The words 'so receiving' evidently relate back to the words of the section first quoted, with regard to the person who 'shall give any sum of money, bribe, present, or reward,'"

etc.; and, examining the words that intervene, we find the enumeration of these two denunciations to be 'any officer, State, parochial or municipal, * * * or to any member or officer of the General Assembly.' "

We are of opinion that the words "officer or member of the General Assembly" must be taken to refer to all persons enumerated in the foregoing portion of the act—that is to say, the State, parish, and municipal officer, or member of the General Assembly; and this view is enforced by the fact that both denunciations are contained in one single sentence.

The motion in arrest of judgment is not good.

It is therefore ordered and decreed that the verdict of the jury and the judgment and sentence thereon based, be annulled and reversed; and it is further ordered and decreed that the cause be remanded to the lower court for a new trial according to law and the views herein expressed.

McENERY, J. The entries made in the books of the Pennsylvania Coal Company, by the direction of the witness Widney, out of the presence of the accused, and some seven days after the commission of the crime, were not admissible evidence to prove the guilt of the accused. The entries in the books were distinct collateral facts irrelevant to the issue.

This is admitted in the trial judge's statement.

Conceding, therefore, that the witness was not an accomplice, but a disinterested witness, under the pretense of corroborating his testimony no fact could be stated by him that was not admissible evidence against the accused.

The credit of a witness may be impeached by proof that he has made statements out of court contrary to what he has testified at the trial. But it is only on such matters as are relevant to the issue that the witness can be contradicted. Therefore a witness can not be examined as to any distinct collateral fact irrelevant to the issue. 1 Whart. Cr. Law, par. §17.

Proof of declarations made by a witness out of court in corroboration of testimony given by him on the trial is, as a universal rule, inadmissible, and, *a fortiori*, a witness can not be allowed to corroborate his own testimony by saying that he made the same statements previously to others. So, too, where it is proved that a witness has at other times made statements

different from his testimony, the party offering him can not be allowed to support his testimony by proving statements at other times corroborative of such testimony.

The witness had sworn that he had paid \$500 to the defendant to bribe him. Seven days after this he caused to be made certain entries in the books of the company of which he was the agent for the purpose of bribing defendant, placing the \$500 to the account of the city. It is incomprehensible how such testimony as to this fact of the entry could be allowed in evidence to corroborate the witness' statement to the bribery of defendant by paying him cash, \$500.

If the witness had voluntarily sworn falsely to matters not within the issue he could have been contradicted as to those matters. 1 Whart. Cr. Law, par. 818.

But it is not pretended in this case that the witness in the examination in chief had voluntarily sworn to any matter not within the issue for which there was an attempt to contradict him.

The greatest latitude in impeaching a witness by proof of his having previously made statements inconsistent with his testimony has gone no further than to allow proof of other statements made by him in accordance with his testimony on the trial. 4 Blackf. 295; 6 Blackf. 300.

The witness in such a case must be first impeached, and there was no impeachment of the witness' testimony on any fact that would justify the admission of the evidence as being in accordance with his testimony on the trial.

According to the statement of the trial judge the contradiction of witness' testimony was to impeach the whole of it "by the most searching interrogatories." Hence the trial judge's statement is that the veracity of the witness had been attacked, and the testimony was admitted to sustain his veracity. If so, the only way of sustaining it was by proof affecting his character for truth and veracity, and the examination must be confined to the witness' general reputation for truth and veracity. Whart. Cr. Law, par. 814.

But the whole controversy in this case is narrowed to this:

Can evidence, which is inadmissible against defendant to establish his guilt, be permitted to go to the jury on the pretense of sustaining the testimony of a witness? The answer must be in the negative, otherwise no rule for the rejection of inad-

missible evidence could be invoked to exclude it from the consideration of the jury.

The trial judge states that the entries contained no recital which had even the semblance of a tendency to identify or connect the accused with the receipt of the money.

He further states that the defendant attempted to prove an alibi by weakening the testimony of the witness by the most searching interrogatories, and thus question the truth of every fact sworn to by the witness.

This statement alone shows the utter irrelevancy of the testimony to the issues in the case, and the necessity for applying the rules of evidence referred to herein.

I concur in the decree for the reasons stated in this opinion.

MILLER, J. One proposition presented by this appeal impressed me at the time of the oral argument as of importance greater than that of any other question discussed. The conviction was on testimony in part derived from book entries, admissible, it was claimed, to confirm a witness who had testified to the guilt of the accused. The offense, according to the testimony, had been committed on the 7th, and the entries directed by the witness made on the 15th, November. The entries carried no significance whatever, touching the accused. They were debits in the books of money paid for apparently legitimate purposes. Their tendency to corroborate the witness who had criminated the accused was not readily appreciable if corroboration implies anything confirmatory of the testimony of the witness in respect to the material issue—the guilt of the party charged by the accusing witness and convicted on his testimony. If not admissible as corroborating the witness on the issues, for which purpose only, in my opinion, the entries were offered, then the conclusion seemed inevitable that the conviction was on illegal evidence carrying the necessary result in criminal cases. It would be, as it impressed my mind, difficult to sustain a verdict on testimony brought forward to serve one purpose for which it was not competent, but none the less contributed to obtain a verdict from the jury against the accused. If the evidence was not admissible as corroboration in any legal sense, then the conviction had been secured on these entries not made by the accused, nor to which he was in any way a party, but

by the witness, and by his direction placed in the books seven days after the offense is stated to have been completed, and all connections of the accused with the accomplice had ceased.

It could hardly be claimed, nor is it appreciated to be urged, that these entries could be deemed part of the *res gestae*. Acts and conduct accompanying the particular fact under investigation are considered as illustrating its character. Such acts and conduct arise out of the event, admit of no premeditation and carry the sanctity due to them as concomitants of the event itself. There were, as is gathered from the bills, two interviews, perhaps more, of the accused with the witness. The last was begun and ended on the 7th November with the bribe then, as the witness testifies, given by him to the accused. It was seven days after that the witness gave to his book-keeper the directions under which the entries were made. It is too manifest to need the least discussion, that the entries formed no part of the *res gestae*. 1 Greenl. Ev., §§ 108, 110.

The State contended for the admissibility of these entries as tending to confirm the witness. He had testified to bribing the accused on the 7th November. It is claimed and conceded in the argument that the defense had afterward assailed the character of the witness for truth by attributing to him a design to misrepresent, and had avowed the purpose to discredit him. The entries offered on the direct examination had been excluded, but with the basis claimed to have been afterward furnished they were again offered and received over the objection of the defense. It was an attempt to sustain the statements of the accomplice as a witness by his book entries. The rule relied on by the State is, that when the character of a witness is assailed on cross-examination the party calling him may support the testimony by proof of statements by the witness on other occasions. Greenleaf thus states it: "Statements by the witness similar to what he has testified in the cause are not admissible, unless a design to misrepresent is charged on the witness in consequence of his relation to the party or to the cause, in which case it seems it may be proper to show he made a similar statement before that relation existed." 1 Greenl., § 469. The rule varied in form, is again stated thus: "Prior similar statements may be given in evidence, made before any improper motive could have actuated the witness; in general, however, prior consistent statements can not be admitted."

Best's Principles of Ev. (Ed. 1883), p. 633, notes. The other text writers and a long array of adjudications state the rule substantially the same. Admissibility of such statements is the exception; prohibition is the rule. The guarded terms in which the rule is couched, announce the limitations as to the time and the relations of the witness subsisting when the statement is made. These entries were made seven days after the bribe was given. It is not understood that the argument for the defense against the admissibility of the evidence is based on the specific ground of the time of the entries, but controverts its admissibility on any grounds.

The circumstances under which the State claims the admissibility of the entries are these: The witness had testified to bribing the accused on the 7th November by giving him \$500. The defense had afterward assailed the witness' character, and with the basis furnished by this attack on his character the State offered the entries to support his veracity. The defense seems to concede the basis existed for supporting testimony, but contend the entries offered for that purpose were forbidden by a well-settled rule of evidence. Whatever the scope of the rule permitting proof of similar statements by the assailed witness, it can not be claimed that under the guise of supporting testimony, illegal evidence can be put before the jury to affect the accused.

The act under which the defendant is indicted makes the giver as well as the receiver of the bribe participants in the offense. We must deal with the witness as in the position the law puts him. It is settled that the jury may convict on the testimony of an accomplice. Where, however, the State, unwilling to rest on his testimony, seeks to confirm it, in my view an important rule of evidence, different from that relied on by the State, is called into operation. In the argument for the State this is called a rule of practice. However called, it is founded on experience of this species of testimony and requires, if such corroboration is attempted, it shall be something more than testimony as to the acts or conduct of the accomplice to be supported. The confirmatory proof must relate to the guilt of the accused. The accomplice has already testified to his own conduct. To be confirmed, reason would suggest that the corroboration must refer to the guilt of the

accused. Corroboration of the acts of the accomplice is not in any sense corroboration of the crime of the party charged.

Mr. Greenleaf states there is some disagreement as to the nature and extent of the corroboration required; some have deemed it sufficient if the accomplice is confirmed in any material part of the case; others have required evidence of the *corpus delicti* only, and yet others who thought it essential there should be corroborating proof that the prisoner participated in the offense, and, when several are tried the confirmation is required as to all; the confirmation of the witness, the text adds, is no confirmation at all, as it respects the prisoner. It is manifest the proof offered here solely as corroboratory testimony meets no test prescribed by Greenleaf. He cites approvingly the rule of the Supreme Court of Massachusetts, that the confirmatory testimony must relate to a material part of the case. The decisions of that court have always been of high repute. The earlier decision was given when its Chief Justice was a great jurist and the associates stood high in the appreciation of the bench and bar. The later decision was pronounced by Justice Gray, now of the Supreme Court of the United States. *Com. v. Holmes*, 127 Mass. 424.

These decisions carry not only their intrinsic force, but have been adopted as the expositions of the law, by Greenleaf, the leading text book on this branch of the law as well as by the later writers. Rice, Ev. The Massachusetts case puts the question—"What is corroboration?" and answers it. It must relate to the guilt of the accused. To prove the accomplice has told the truth as to irrelevant and immaterial matters known to everybody would have no tendency to confirm his testimony involving the guilt of the party on trial. If this were the case, every witness could always furnish materials for the corroboration of his own testimony. If he could state "where he was born," and the decision goes on to enumerate other unimportant points, he might easily get confirmation of all these particulars. But these circumstances having no necessary connection with the guilt of the accused.

Proof of the correctness of the statements in respect to them would not conduce to prove the statement of the guilt of the defendant. There is no substantial difference developed by the authorities on the principle so well stated by the Massachusetts court. The decision in the first case was years ago; and in

the later decision, Justice Gray being the organ, the rule as to the corroborative testimony of an accomplice was affirmed in the strongest language, as laid down in the earlier case.

The adjudications of other courts, notably of Pennsylvania and Georgia, are to the same effect. In the last case of the Massachusetts court the prisoner, indicted for arson, was convicted on the testimony of an accomplice. He was confirmed in various particulars of his conduct to which he had testified on the stand. Thus he had testified that on the night of the crime he had walked around town, gone to a lecture, met with companions; leaving them, had approached the barn, and saw the accused with burning straw in his hands who admitted he had fired the barn; that he then went away, reached his father's home about midnight and went to bed. The witness further testified that later the accused gave him some bank bills as he had promised. The accomplice was confirmed by the testimony of others on all the points of his testimony except as to the material issue—the guilt of the prisoner; that is to say, by other testimony he was confirmed in his statements as to his walk, his visit to the lecture room, the company he met, the time he went to bed, and finally that he had been seen with bills in his hands, like those to which he testified. It will be perceived that none of the corroborating testimony touched the guilt of the prisoner. All was admitted over the objection of the defense. The parallel between that and the instant case is obvious. Here, the corroborating testimony relates only to the conduct of the accomplice. It confirms him in these particulars to which he testified—that he gave directions to his book-keeper to enter on the books the amount of the bribe, and the entries were made. The corroboration does not, in the faintest degree, bear on the guilt of the accused. In the Massachusetts case, decided by Justice Gray, the proof was deemed inadmissible as irrelevant and incompetent, the court holding that no evidence can be legally admitted as competent for corroboration of the accomplice that does not confirm the testimony on a point material to the issue in the sense it tends to prove the guilt of the accused. As we appreciate the argument of the State on this point, the reliance is solely on the right of the party calling the witness to support his credit by proof of similar statements on other occasions, and hence the State cites Roscoe, Starkie and a large

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array of decisions. There is no controversy here as to the right to sustain a witness by proof of similar statements in those cases where the rule applies. Nor is there any contention that a basis for such supporting testimony is afforded by questions on cross-examination, or other modes denoting the purpose to discredit the witness. To this supposed contention much of the argument of the State has been directed. The real issue is, whether any corroborative testimony is competent to sustain an accomplice that does not confirm his testimony as to the guilt of the prisoner. It is the question as to the corroboration required in the case of the accomplice we have to deal with here, and not the other issue to which the argument and authorities of the State have been largely directed—*i. e.*, the general rule that an assailed witness may be supported by proof of his similar statements on other occasions. It is stated in the bills that the entries are offered for corroboration, not of the facts that fix guilt on the accused, but to confirm the witness' narrative as far as possible, and to sustain his veracity. The only tendency of the entries is to show the accomplice told the truth in respect to directing the entries, and that they were made. To that extent they sustain his veracity, and no further. It is conceded they have not the remotest tendency to fix the guilt of the accused. If Justice Gray's exposition of the law is correct, surely the evidence falls within the prohibition he so clearly announces. He was dealing with corroborating testimony as to facts stated by the witness, not pertaining to the guilt of the prisoner. Here the court is dealing with corroboratory evidence of facts testified to by the witness, but not bearing on the guilt of the accused. Justice Gray held that no such testimony could be admitted to corroborate an accomplice. It was incompetent and irrelevant, in his view, unless it tended to prove the guilt of the accused. It must appear that to hold these entries competent evidence, we must determine that the construction of the law by these two decisions of the highest court of Massachusetts is erroneous. There must also be denied to the text writers the authority accustomed to be paid to them. At an early period our Legislature declared that the forms of proceeding and rules of evidence in criminal cases should be according to the common law. For more than ninety years our courts have been guided by that system, and the judicial expositions of its principles and of its

rules of evidence in criminal cases. See Act 1805, now section 976, Rev. St.; *State v. McCoy*, 5 Rob. 545; *State v. Lacombe*, 12 Ann. 195. A rule of evidence in criminal proceedings observed in the common-law courts, that testimony offered to support an accomplice is not competent, that confirms only as to facts not touching the guilt of the prisoner, is commended by a force of reason and authority that the legal mind finds difficult to resist.

The sequence of the introduction of improper evidence against the accused is apparent. The testimony offered to corroborate proving nothing in respect to the guilt of the accused, advances in no respect the solution of the issue of guilt. Under the guise of corroboration it serves to put before the jury incompetent evidence to affect the prisoner. That effect was the precise question determined in the Massachusetts cases thus stated in the clearest language by the learned judge in the last case. Determining that no evidence can be admitted as competent for corroboration that does not tend to prove the guilt of the accused, the result is, as he states it, that if any evidence is admitted by way of corroborating the accomplice, so as to make it safe for the jury to convict, which is not legally entitled to that effect, it is a subject of exception and a ground for a new trial. That must be the result here, or the rule of law disregarded.

The admission of illegal evidence in a civil case is comparatively unimportant. The judge disregards the incompetent evidence, and the judgment is based on that which is legal. But in a criminal case the judge has no such function. It is for the jury to convict, and is presumed to act on all the evidence submitted. It is impossible to determine what influence has been exerted on their minds by illegal evidence, and it is the right of the accused to be tried on legal evidence alone. If that right has been invaded there has not been the fair trial guaranteed to all by the Constitution and laws. Hence this court is powerless to accept any suggestion, even if it were made, that without the improper evidence there was enough to convict. To this effect is the uniform current of all authority well epitomized thus: The admission of illegal evidence can not be disregarded on the ground that the other evidence in the cause was sufficient to convict. The conviction must be by legal evidence only. And again, thus: The court can not

look into the whole case to determine whether or not there is other testimony sufficient to establish the defendant's guilt. To do so would be, in effect, to set aside the verdict of the jury, and to form conclusions for ourselves from the evidence. The defendant is entitled to the verdict of a jury upon competent testimony alone.

The rules of evidence are for all time and for all men. They tend to secure the conviction and punishment of the guilty. They have the no less important function of guarding the rights of the innocent who may be accused of crime. It is bad if the guilty sometimes escape. It would be worse if criminal trials were conducted without regard to those rules the wisdom of the law has provided for the guidance of courts.

The new trial being inevitable, it is proper to state that, in my opinion, the act of 1890 is applicable to the offense charged. The accused can be tried again on that indictment, and this opinion simply indicates the illegal evidence to be excluded. I concur in the decree.

Dissenting opinion regarding the interruption of counsel :

BREAUX, J. The trial court certifies that it had decided that Act No. 78 of 1890 applied if the defendant was guilty of having received a bribe.

The court's statement in the bill of exceptions is sustained by the record.

An indictment against the defendant for the offense charged had been quashed on the ground that the act of 1890 applied. In the case at bar a demurrer on the ground that the defendant was not bound to answer had been filed and overruled. The court had in these proceedings laid down its interpretation of the act in question.

The opinion of counsel regarding the law differed from the ruling of the court. One of counsel, addressing the jury, read Art. 168 of the Constitution; and continuing his argument referred to the act of 1890, and stated to the jury that as to the receiver of a bribe, the statute is plain, that the only persons contemplated, were the officers and members of the General Assembly, and counsel was interrupted at this point by the court, and was informed that, if he intended to question the applicability of the statute, he would not be permitted.

We have seen that the court had previously ruled.

If the trial court is subjected to a review of its ruling before the jury, and to an appeal to them for their reversal of the ruling by their verdict, it will be subversive of the respect due to that tribunal.

The jury should have confidence in the ability of the trial judge to properly interpret the law, and the judge should feel confident of the desire of the jury to discharge their duty. That confidence will be shaken if an appeal be allowed from the court to the jury. We have found no decision favorable to such an appeal, either English or American, to which attention has been called.

The case of the Dean of St. Asaph, made illustrious by the address of Erskine, the greatest advocate and forensic orator of his age, is cited by defendant's counsel.

The position of the defense has no support in this case, as will appear by a brief review.

The dean, was one of a great many respectable gentlemen, impressed by the danger to the public credit occasioned by long war, and, oppressed by grievous taxes, published a suggestive and guarded dialogue between a farmer and scholar, in which the scholar, meaning to illustrate the great principle of good government, asked the farmer a number of suggestive questions, which the public prosecutor charged were seditious and conceived to excite disloyalty and disaffection.

The dean was brought to trial as one of the principal offenders. In defending him, Erskine argued against the restraint placed on the jury by the court.

The juries, at the time, in all cases of alleged libel and treason, were confined to a finding of the fact of publication as charged.

They were not permitted to determine whether it was or not a libel or sedition.

Erskine contended that it was a question of libel or no libel, sedition or no sedition, and not a question exclusively of publication, and that the jury should exercise jurisdiction over the whole charge. His address paved the way for greater rights to juries in the administration of criminal justice.

He, with great clearness, admits that an accused can not claim before the jury the protection of a deficient indictment.

But he claimed that the jury should exercise jurisdiction over the whole charge in finding a verdict.

The constitution of 1879, of this State, has applied the principle for which he contended by ordaining that the jury shall be the judges of the law and the facts after the charge, and not of questions of law arising during the trial and necessarily decided before the case goes to the jury.

A text writer, referred to by the defendant's counsel in this case, said that at the time of the foundation of the English colonies in this country there was a very strong feeling against arbitrary power, as the colonies had painful recollections of the abuse of judicial power in the mother country, and therefore it was natural that they should seek to enlarge the power of the jury and diminish that of the judge. Hence, the doctrine that the jury could take away the law into their hands without regard to the judge's charge—popular before and at the time of the Revolution.

Even if the preponderance of judicial authority was not, in this country, as it is, in favor of the doctrine that the jury should take the law from the court and apply it to the evidence under its direction, under the doctrine popular before and at the time of the Revolution, regarding the rights of juries, an appellate court will find no authority to grant a new trial and remand a case to enable the defense to argue a proposition not founded in law. The avowed purpose of the defendant was to argue a proposition that the trial court had decided illegally, and the ruling is affirmed by this court.

What useful purpose would be served in thus remanding the case as applied for? Surely, not to enable the jury to reach a different conclusion in regard to the act of 1890, relative to bribes.

The facts which form the basis of the third and fourth bills of exceptions are:

That to the witness, Widney, the District Attorney propounded questions as to who furnished the amount of the alleged bribe.

The objection was that the evidence was not admissible for the reason that conversations between third persons tending to implicate the defendant, but not had in his presence, is irrelevant.

There were three parties to the agreement regarding the alleged bribe—Widney, Wood and Callahan.

In compliance with the agreement entered into by these parties, in person, the witness testifies he paid the amount. Wood was not a third person to the agreement. He and Widney had interviews with the defendant, and acted concurrently in the matter of securing a privilege from the council through the defendant.

Moreover, the judge certifies that the fact sought to be elicited by the question objected to had gone to the jury when the objection was made in answer to questions previously propounded.

The admissibility of testimony can not be determined if the complaint is first made when the statement of a witness is reiterated. *State v. Holmes*, 40 Ann. 170; *State v. Donelon*, 45 Ann. 775. Part of the *res gestae*.

Question also arose regarding the admissibility of the "stub" to identify the check, cash book and ledger. With reference to the first, the trial judge certifies that over the objections of counsel for defendant he ruled that the stub of a check drawn to bearer for \$500, and dated November 7, 1893, with pencil mark, "Ent. 15" written across, was admissible as part of the *res gestae*. To the ruling, counsel for the defendant excepted. It was a contemporaneous entry with the alleged bribe and part of the transaction. It was immediately incident to the principal act; part of the direct concomitant or conditions of the act. Whart. Cr. Ev. (9th Ed.), par. 266.

The following is from Thompson on Trials (page 466), and has some bearing: "And where an accomplice testifies that he had paid a bribe to the defendant (on trial for bribery) by giving to the defendant a check upon a certain bank, payable to cash or bearer, which had afterward been returned by said bank to the witness, it was competent for the State, in corroboration, to show by the books and business memoranda of the bank a credit to the defendant for a like amount, deposited by check two days after the alleged bribery."

Stub and entry in book are closely related.

This evidence being admissible, and the stub admitted being identified on its face with the entries in the books, to which the most serious objections are made, it does not seem that entries thus identified are inadmissible, as they are part of

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one act; that the law supporting the admissibility of the stub goes far toward justifying the admissibility of the entries in the cash book and ledger. They are intimately connected, and among business men the existence of check and stub suggests proper entry in cash book and ledger.

In the lower court a distinction was made between the check and stub and the entries in the books. The latter—the entries—were finally admitted.

The prosecuting officers state that the entries in the books of the Pennsylvania Coal Company were not offered for the purpose of corroborating the testimony of an accomplice as to those facts which fix the guilt of the accused, but for the purpose of sustaining his veracity.

On the part of the defense it is urged that the evidence was admitted to corroborate an accomplice. The court certifies that the evidence was not admitted for the purpose of corroborating the testimony of an accomplice, as contended by the defendant; that on the cross-examination of the witness, Widney, there was an attack made upon his veracity, and that the defendant had laid the foundation for impeaching his testimony, by propounding questions to that end; that without the testimony the State would have been left in a crippled condition without an opportunity of repairing the effect of the attack upon the veracity of the witness; that the avowed purpose of the cross-examination of the witness had been to show that his statement, with reference to the alleged bribe, was a fabrication of recent date, and that witness' statement subsequent to the 15th of November (the date of the entries in the books) would establish the fabrication. The principle is well settled that if evidence had been offered to show bias, improper motive or recent fabrication on the part of a witness, previous account, given at a time unsuspecting, is admissible on a redirect examination. Best's Principles of Ev. In *People v. Vane*, 12 Wend. 79, it was decided that the rule applies to an accomplice:

"The witness shows on his direct examination that he was an accomplice. His testimony is, therefore, suspicious; it comes from a tainted source and may well be doubted. In such a case it seems to me the principle applies, that a witness who is impeached may be supported. * * * The rule is laid down by Macauley, that what a witness has been heard to

say at another time may be given in evidence either to invalidate or confirm the testimony which he gives in court." In *Com. v. Scott*, 123 Mass. 222-233, referring to *Com. v. Bosworth*, 22 Pick. 397, it is said: "In that case (*Bosworth*), that the evidence in corroboration of the accomplice was admissible." See also *State v. Hendricks*, 32 Kan. 559, 563.

From Bishop on Criminal Procedure (page 1170), we quote: "Not inconsistently with these views it is permissible also to submit to the consideration of the jury, evidence tending to show the accomplice's probable credibility, in his narrative, though coming short of the required confirmation." That rule is approvingly referred to in *State v. Banks et al.*, 40 Ann. 739, in deciding a point similar in some respects. The evidence was not admissible for the purpose of corroborating the testimony of an accomplice. It was admissible to prove the fact—the entry in the employer's books—in regard to which he was impeached on cross-examination.

At the time the entries were made, it was not self-serving, but it was the reverse, self-harming, evidence of an agreement reprobated and denounced by law. The State attempted to sustain his testimony, assailed, by offering book entries to establish that he had withdrawn the amount from the business in his charge as agent. The fact had been previously proved by the "stub book," identified with the entries. The former—the "stub book"—was legal evidence it is now decided.

Mr. Rapalje, in his treatise on the "Law of Witnesses," (page 252,) under the headnote "Cross-examination of Accomplices," explains that the chapter regarding witnesses, applies equally to compliances, except "that the latitude of cross-examination is especially extended where the witness is an accomplice, in allowing questions having a tendency to shake his credit by injuring his character, or to prove his accuracy or veracity; and in such matters is left to the enlightened discretion of the court trying the cause, and its action will not be reversed unless such discretion appear to have been abused;" and when this cross-examination "tends to create a distrust of his integrity, fidelity or truth, it was held competent for the adverse party to ask the witness an explanation which might show the consistency of such facts with his integrity, fidelity and truth, although circumstances might thus be proved which

were foreign to the principal issue, and which, but for such previous examination, would not have been permitted to be proved."

No one denies that the object of the law of evidence is the discovery of truth under systematic methods. It should also be conceded, for it is the law, that a witness may be sustained, whether impeached on cross-examination, or by examining other witnesses in rebuttal.

This being the rule, let us assume, for illustration, that the amount was \$10,000, instead of \$500, and that the defense had produced evidence in rebuttal in proof of the utter impossibility of the witness having given that amount for reasons stated by the impeaching witnesses.

Evidence, under the circumstances, is admissible only to sustain the witness in the statement that the employer's cash furnished the amount, as shown by stub, cash book and ledger, if there is not the least ground to suspect that the evidence is untrue; and admissible only to establish that the witness did not state an untruth when he swore that he had the amount. As to whether he gave it or not as a bribe is another matter. It does seem that these instruments of evidence are admissible exclusively to prove that that sum was from the business of the employer, although charged as in this case. *State v. Hendricks*, 32 Kan. 559, 563; *State v. Maury*, 54 Conn. 178-191; *State v. Wolcott*, 21 Conn. 272-281.

THE ALLEGED REFERENCE TO DEFENDANT.

It is error if the court permit counsel, against defendant's objection, in addressing the jury, to comment on the omission of the defendant to testify as a fact for consideration in determining the case.

The facts which form the basis of the bill of exceptions to the court's ruling refusing to treat the whole case as a nullity, because of a remark of the assistant district attorney, are that, in addressing the jury, he said: "Who has denied that the defendant has received five hundred dollars? The accused has not denied it. I have not heard him deny it;" to which counsel for the defendant called attention of the court, and instructed the jury that they must disregard the remarks of the assistant district attorney.

That the prosecuting officer then continued his address to the

jury, saying, in substance: "I meant that there was no testimony in the case to prove that Callahan denied accepting or getting the money, and there has been no scintilla of evidence contradicting the statement of Wood and Widney, and that he meant no personal allusion to Callahan."

The jury were also instructed in the general charge that they were not to construe anything unfavorable to the accused by reason of the fact that he had not testified. If, despite the explanation and withdrawal of the remarks by the district attorney, there lurked the least presumption in the minds of the jurors, it must have been removed by the instruction of the court. The allusion and the correction brought out prominently that no inference was to be drawn against the accused from his omission to testify. It was, at most, a hasty utterance immediately corrected by cautioning the jury against giving it the least importance. "The judge is not required to treat the whole case as a nullity because of such remarks." *Com. v. Worcester*, 141 Mass. 58, 59; Whart. Cr. Ev. (9th Ed.), p. 435; Rap. Law of Wit., 252.

THE INSTRUCTIONS GIVEN TO THE JURY.

Lastly, the defendant requested the trial judge to instruct the jury that, if it was the duty of the accused to favor and vote for the ordinance of the council in question, and if he did favor and vote for it, without partiality and favor, as a matter of law the accused was not guilty. The court gave the charge requested, and added (to which addition the defendant objected): "But I charge you further, that if he voted for it and favored it by reason of the fact that he was paid for it, he would have acted with partiality or favor, and if you should so find beyond a reasonable doubt he would be guilty."

The theory of the defense was, if the accused received the amount he was guilty of extortion in office, and not of receiving a bribe.

Requiring an amount for a vote is the crime denounced.

When the statute of 1890 was adopted, there were statutes in the books denouncing extortion in office.

Nevertheless, the law-maker created a new offense, and provided more severe penalties. It is not within the authority of the courts to restrict or change the legislative intent as expressed in the text. The office is honorary, without emolu-

ment of any kind. If he accepted an amount which influenced him to vote with partiality or favor, the offense was within the meaning of the statute.

The CHIEF JUSTICE concurs in this dissent.
Rehearing refused.

NOTE.—*Election—What is.*—The selection by the council of the president of the board, is an "election," within the meaning of the Kentucky statute, prohibiting the offering of a bribe to influence one's vote at an "election." *Com. v. Root*, 96 Ky. 533.

Section 1437, providing that whenever in said chapter 41, the word "election," or an equivalent expression is used in reference to a State, district or municipal election, it shall be deemed to include the decision of questions submitted to the qualified voters as well as the election of officers, does not restrict the meaning of the word. *Id.*

Indictment.—Under the Kentucky statute, providing that a bribe is any reward to the person influenced, or intended to be influenced, or to another "at his instance," an indictment which, though not alleging that the reward offered to another than the voter was offered at the voter's instance, alleges that it was offered to such other person with intent to influence the voter, and did influence and control the voter in his vote, is sufficient. *Com. v. Root*, 96 Ky. 533.

Instructions.—A mature person of ordinary intelligence, who knowingly offers as a bribe to a juror, money given her for that purpose, becomes an accomplice. *State v. Carr*, 28 Or. 389.

Same.—The offer of a bribe upon the suggestion of an officer that he will accept it is not punishable. *O'Brien v. State*, 6 Tex. App. 665.

BROOKS v. STATE.

(96 Ga. 353.)

BURGLARY: *Hearsay evidence—Burglary—Possession of stolen goods—Presumptions—Requests to charge.*

1. The declarations of an alleged owner, claiming certain goods found in the possession of a person accused of burglary, made some time after the date of the commission of the alleged offense and not in the presence of the person accused, are hearsay only, and should not be admitted.
2. Where a person accused of an offense makes a confession in which he implicates another in its commission, declarations of the latter, denying complicity, made to the officers when informed of the confession, are hearsay only, and upon the trial of the former should not be admitted against him.
3. No presumption of guilt arises from the mere possession by the accused

of goods alleged to have been stolen from the premises at the time of the commission of the burglary, unless the goods were shown to have been in fact stolen therefrom, and the accused is found recently thereafter in the possession of them; and a charge of the court, upon this phase of the case, which leaves entirely out of consideration both or either of these elements, is erroneous.

4. It is never too late for counsel to present to the court pertinent written requests to charge, until the jury has retired for consideration of the cause; and a refusal of such a request upon the ground that it came too late—it being handed to the judge upon the conclusion of the general charge, but before the jury had in fact retired—was erroneous.

Frank Brooks was convicted of burglary and brings error. Reversed.

Error from Superior Court, Wilkes County; Seaborn Reese, Judge.

Colley & Sims and F. W. Gilbert, for plaintiff in error.
W. M. Howard, Solicitor General, for the State.

ATKINSON, J. 1. The defendant was indicted for the offense of burglary. On the trial of the case the State offered to prove by one of its witnesses, that he had taken some of the goods found in the possession of the defendant and carried them to a storekeeper whose store had been burglarized, and that upon showing them to the storekeeper, he exclaimed that they were his goods. To the admission of these declarations, the defendant objected upon the ground that they were hearsay only, and were therefore not admissible. This objection was overruled by the court, and the testimony admitted. We think that the objection to the testimony was well taken. As to whether or not the property alleged to have been stolen was in fact the property of the storekeeper and had ever been in fact in the store alleged to have been burglarized, were material questions bearing directly upon the guilt or innocence of the accused. These declarations made by the storekeeper could only be admitted under the sanction of an oath. The facts sought to be established by the declarations were not otherwise proven than by the declarations themselves; so that the substantial fact which went to the consideration of the jury was wholly unsupported by the oath of any one. It was strictly hearsay evidence, and therefore should have been excluded.

2. So likewise, when the defendant, being accused, makes a confession of his guilt, implicating another person, and the other person, upon the confession being communicated to him, denies his complicity, the declarations of the latter are hearsay only, and are not admissible upon the trial of the person making the confession. The confession can not be impeached or discredited by unsworn testimony, and it was therefore error to admit the declarations of the alleged accomplice.

3. Upon the trial of the case, the court, in charging the jury touching the presumption arising from the recent possession of stolen goods, instructed them as follows: "If you believe from the evidence that this defendant broke and entered the house alleged in the indictment, at the time alleged, he is guilty of the offense of burglary. To illustrate whether or not he broke and entered, you may consider all the evidence in the case; and one of the evidences you may consider is, whether or not, if the breaking and entering of the store has been established to your satisfaction, then in determining whether this defendant was the person or one of the persons who broke and entered, you may consider the question as to whether or not recently after the breaking and entering, he was in possession of goods that came out of that house. And the law on that subject is, that a person in possession of property recently after the commission of a burglary, having been in the place broken and entered, that you may infer from that fact his guilt as being the person who broke and entered."

Exception was taken to this charge, as incorrectly stating the rule of law by which the jury were to be guided in the consideration of that class of testimony. We think the charge was erroneous. It left entirely out of consideration the question as to whether the goods were stolen from the house at the time the burglary was alleged to have been committed; and this is one of the important elements to be considered in determining the weight of that class of testimony. Two things must concur: it must be shown that at the time the alleged burglary was committed the goods were taken from the house which was broken, and it must be shown that recently thereafter they were found in the possession of the defendant. It is not the recent possession of goods that might have been in the storehouse, but the recent possession of goods shown to have been stolen therefrom at the time the burglary was committed,

which affords the presumption upon which the guilt of the possessor of the stolen goods may be inferred. It will be observed, upon an analysis of the instruction given to the jury in this case, that they might have found the defendant guilty under that instruction, upon the ground that he was found recently in the possession of goods, which, however, passed honestly out of the stock of the proprietor of the store before the burglary was in fact committed. We think, therefore, that the charge of the court, leaving out of consideration the question as to whether the goods were stolen from the house at the time the alleged burglary was committed, was error prejudicial to the defendant.

4. The question of practice stated in the last headnote requires no further elaboration. Judgment reversed.

NOTE.—*Presenting instructions before jury retires.*—I entirely agree with the court that it is never too late for counsel to present to the trial judge written requests to charge the jury, and when it appears that the matter presented, was of vital importance, and counsel, through negligence or inadvertence had overlooked it until after the charge was read to the jury, then the court, in justice to the accused, ought to permit such requests to be handed up, and, if proper, to read them to the jury. There is no reason why counsel should not be compelled by rule of court to hand up all requests at a certain stage of the trial, so as to give the judge an opportunity to carefully read and study them. Counsel sometimes hands up to the judge at the very last hour of the trial a number of confusing, and in some instances, contradictory statements of the law. This is imposing upon the trial judge a very irksome task.

Misconduct of court and jury—View of premises—Discretion of court.—On a trial for burglary, the jury, after several hours' deliberation, were brought in, toward night, and announced that an agreement could not be had without a view of the premises. The court, after consulting with counsel apart from the jury, over the objection of the prosecution, decided to allow the view, on defendant's request, and, with his consent, to dismiss the jury for the night, as no view could be had till morning. The next morning defendant's counsel privately told the court that he would move to dismiss because of the separation of the jury, at which the court became greatly indignant, and, when the counsel moved for the dismissal, denied the motion, and, in an indignant tone, told the jury that they had been dismissed the night before on the motion and with the consent of defendant and his counsel, but "defendant now prefers to move that all proceedings in this case be dismissed." The jury then retired, and, without a view, in five minutes, returned a verdict of guilty. *Held*, that the verdict must be set aside. *People v. Hawley*, 111 Cal. 78.

It is within the discretion of the court, on a trial for burglary, when informed by the jury that they can not agree on a verdict without a view of the premises, to allow such view, with consent of defendant. *Id.*

Pen. Code, California, requires the jury, after retiring to deliberate, to be

kept together. *Held*, that the requirement is mandatory, and a separation, though by order of court, with consent of the defendant, is a violation of the requirement, and vitiates a conviction. *Id.*

A motion to discharge defendant in a criminal case for separation of the jury, had on his motion and with his consent, is properly denied. *Id.*

Instructions.—Where the court is requested to instruct that the jury should receive the testimony of an accomplice with great caution, and might disbelieve it altogether, it is not error to add "if they have a reasonable doubt of its truth." *Brown v. State*, 72 Miss. 997.

Same.—The refusal to give a proper instruction is not reversible error where the law has already been covered by another instruction. *Schaeffer v. State*, 61 Ark. 241.

Same—Intent to commit petit larceny.—On a trial for entering a storehouse at night with the intent to feloniously and burglariously steal and carry away goods to the value of \$15, the refusal to instruct that, if defendant entered prosecutor's house with the intent to commit petit larceny only, he would not be guilty as charged, was error. *Id.*

Capacity of defendant to commit crime.—Capacity to commit crime is a question to be determined by the jury from the age, appearance and conduct of the accused, both at the time of the commission of the offense and at the time of the trial. *State v. Williams*, 40 W. Va. 268.

Same.—Where the defense is that accused was laboring under such a defect of mind as not to know the nature of the act with which he was charged, the court should have permitted him to show by his mother that she had another son, who was all of his life an imbecile. *Schaeffer v. State*, 61 Ark. 241.

Same.—Testimony by witnesses that they had known defendant for many years, and that they did not think that he was capable of distinguishing between right and wrong to such an extent as to be able to know that it was wrong to commit burglary, is not a sufficient foundation to render admissible their opinions as to whether "he would have sufficient mental power to keep him from committing a crime," if he knew that it was wrong. *Livingston v. State*, 105 Ala. 127.

Witness—Impeachment of.—That the State introduces evidence tending to show a different state of facts from that testified to by a witness for defendant is not an impeachment of defendant's witness so as to entitle defendant to introduce evidence to sustain such witness. *State v. Nelson*, 13 Wash. 523.

Same—As to value of diamonds.—On a trial for burglary, a witness for defendant who was not an expert in diamonds, offered to show the jury diamonds very similar to those which the state's witnesses had identified as the stolen property. *Held*, that the court properly refused to have the stones go to the jury, since to discredit the state's witnesses, defendant should have presented the stones to them when on the stand, in order to test their power to distinguish between the stones presented by the State and those offered by defendant. *State v. Ellwood*, 18 R. I. 234.

Footprints.—In a trial for burglary, it was error to allow witness to testify that tracks found near the scene of the crime corresponded, in his opinion, with the tracks of defendant. *Livingston v. State*, 105 Ala. 127.

Presumption arising from possession of property recently stolen.—In *Keating v. People*, 160 Ill. 480, the following instruction was given :

"The possession of stolen property soon after the commission of a theft is *prima facie* evidence of the guilt of the person in whose possession it is found, and is sufficient to warrant a conviction, unless the other evidence in the case or the surrounding circumstances are such as to raise a reasonable doubt of such guilt."

Commenting thereon, the court say: "As a statement of the law, the proposition contained in the instruction is sustained by many authorities, among which are the following: *Smith v. People*, 103 Ill. 82; *Unger v. State*, 42 Miss. 642; *Foster v. State*, 52 Id. 695; *Tucker v. State*, 57 Ga. 503; *Brown v. State*, 59 Id. 456; *State v. Turner*, 65 N. C. 592; *Knickerbocker v. People*, 43 N. Y. 177; *Commonwealth v. Randall*, 119 Mass. 107. It is urged, however, that the instruction assumes that there was stolen property. It is not denied that paper money or bills, to the amount of \$200, were found secreted upon the person of the plaintiff in error, but it said that this money is not conceded to have been stolen. We think that the question whether or not the property was stolen, was fairly left to the jury when all the instructions are considered together as one charge."

Same.—In *State v. Conway*, 56 Kas. 682, the defendant requested the court to instruct the jury that the possession of stolen property shortly after the burglary was not evidence of the commission of burglary. This was refused, and the court gave the following instruction: "The possession of stolen property, recently after it is stolen, is *prima facie* evidence of guilt, and throws upon the possessor the burden of explaining such possession." The possession of stolen property may, (says Martin, C. J.), under certain circumstances, be evidence tending to show the commission of a recent burglary; as if goods are placed in a building well secured in the night time, and early the next morning they are found in the possession of one who has no right to them, this recent possession might tend to show that the possessor had not only stolen the goods, but had broken into the building to obtain them. The instruction requested was therefore erroneous. It would generally be error in the opposite direction, however, to declare that the recent possession of goods stolen out of a building is evidence of burglarly as well as larceny, and the instruction of the court should have been modified so as to state that the possession of stolen property recently after the theft is *prima facie* evidence of guilt of larceny. But the court very fully and fairly instructed the jury as to the law of burglarly and larceny, and the instruction as to the possession of stolen property was evidently intended by the court, and understood by the jury, to have reference only to the offense of larceny; and the failure to modify the instruction as above indicated can not be regarded as prejudicial error.

STATE V. ROGERS.

(56 Kas. 362.)

BURGLARY: Continuance—Evidence on former trial—Instructions—Disagreement of jury—Adjournment of court—Presumptions on appeal.

1. In a prosecution for a felony, the defendant applied for a continuance on the ground of his sickness and disability. A committee of physi-

- cians was appointed by the court to visit the defendant, and report, which they did. Afterward another committee of physicians was appointed to treat the defendant until ready for trial, when, the case being again called, another application for continuance was made, which, upon hearing evidence, the court overruled, finding that the defendant was able to be present. *Held*, that there was no abuse of discretion in overruling the application for a continuance.
2. On a second trial of the defendant upon an information for a felony, the State offered to read, from a writing purporting to be a bill of exceptions taken on the first trial, the testimony given by the defendant in his own behalf. It was admitted that the document was such bill of exceptions, and it is stated in the record that counsel "reads to the jury the following testimony of G. W. Rogers, which is in words and figures as follows," to wit: *Held*, that the evidence was sufficiently identified, and was admissible.
 3. The practice of calling in a jury, and lecturing them upon the desirability of an agreement, is not to be commended; but the oral remarks of the court to the jury in this case were not so objectionable as to warrant a reversal on that ground.
 4. The district court may adjourn to a time beyond the commencement of the regular term in another county of the same district; and this, in the absence of any showing that the court was held in both counties at the same time, does not invalidate the proceedings at such adjourned term.
 5. The presumption, in the absence of anything in the record, is that the court discharged its duty in admonishing the jury as required by the statute, upon each separation.

Appeal from District Court, Reno County; F. L. Martin, Judge.

George W. Rogers was convicted of burglary, and appeals. Affirmed.

The defendant was convicted in the district court of Harvey county of burglary in the second degree, the crime being committed on the night of March 23, 1893, by breaking into a building occupied as the court-house of said county, with intent to set fire to, burn and destroy the books and records of said county. After sentence, he appealed to this court, where the sentence was reversed, because of the admission of incompetent testimony. The report of the case contains a summary of the evidence. 54 Kan. 683-698. A change of venue was afterward granted, and the case was sent to Reno county for trial. It was called for trial May 13, 1895. The defendant applied for a continuance on the ground of the absence of witnesses, and the court held that the showing was sufficient; thereupon the State consented to the reading of

the evidence contained in the application as the depositions of the absent witnesses, and a jury was impaneled and sworn to try the cause, a plea of not guilty having been entered. No further proceedings were had until the next day, when, the case being called, it was announced that the defendant was sick, and unable to attend the trial. His home was at Newton, where he went with Willard Kline, one of his attorneys, on the evening of May 13th. The State requested the court to appoint three physicians to go to Newton, and examine the defendant, and report his condition; and thereupon the court appointed Drs. Klippel and Colladay, of Hutchinson, and Dr. Boyd, of Newton, to perform that service, and the court adjourned until May 15th. On that day, the physicians and Willard Kline were called and examined as witnesses respecting the physical and mental condition of the defendant, and the court found therefrom that the defendant was able to be present in court, and that his physical condition was not such as to prevent or excuse him from attending, and the sheriff was ordered to bring him into court on May 16th, at nine o'clock A. M. When that time arrived, counsel for defendant again applied for a continuance on the showing already made and the affidavit of Stella E. Rogers, wife of the defendant, which was read. Thereupon the sheriff was ordered to take charge of the defendant, with such deputies as he might choose, and Drs. Sidlinger, Shearer and Wilson were appointed to treat him until ready for trial, and to see that nothing was given him except under their direction. The court adjourned to May 17th, and then again to May 20th, which was the last day of the regular term, as the law fixed May 21st as the beginning of the regular term in Harvey county, in the same judicial district. On May 20th, the court again adjourned to May 22d, when the case was called, but it was objected on behalf of the defendant that the term had expired by law, and another term had commenced in Harvey county; but the objection was overruled, for the reason stated orally by the judge, and not otherwise appearing, that he opened the court in Harvey county on May 21st, and adjourned the same until June 3, 1895.

The defendant and his attorneys again applied for a continuance on the ground of the inability of the defendant to be present and advise with his counsel and direct the management

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of the case, and in support thereof offered another affidavit of said Stella E. Rogers, and the State presented the affidavits of Drs. Wilson, Klippel, Colladay and Sidlinger in opposition thereto; and thereupon the court found that the defendant was able to be placed on trial, and was in a fit and suitable condition physically to be present, and the application for a continuance was overruled, and the case proceeded to trial. It appears that the defendant occupied a cot during the trial, and spoke to his counsel only in whispers, and that, while testifying as a witness, his answers were repeated to the jury by his counsel; but it was claimed by the State, and the evidence heard on the application for a continuance strongly tended to show, that the sickness of the defendant was feigned, and not real, and that his disability was simulated, although he was really weak and not in good health. The trial proceeded until May 25th, when the court instructed the jury, and the case was then argued by counsel and submitted. On May 28th, after the jury had deliberated twenty-four hours, they were brought into court, and the judge made remarks orally, which were afterward reduced to writing by him, as follows:

"Gentlemen of the jury, the duties of a juror in every case are very arduous, and you have been out in this case for twenty-four hours, and I suppose that I need not remind you that it is a matter of great public importance that this case be decided. You, of course, know yourselves that it has been a great expense to the public to try this case; and if you should disagree, and another trial should be had, all the expense of this trial being lost, and another trial being had at the same expense, after the trial was through, and the jury impaneled to try the case again would probably have no more evidence than has been presented to this jury, and there is no reason why this jury should not decide this case with the same fairness and correctness that any other jury should decide it. I feel, therefore, that I could not discharge you as jurors in this case without requiring you to a much greater effort to agree upon your part upon a verdict than you have made up to date. I suppose, as you stated this morning, there are no questions of law about which the jury disagree. If there are any such questions, you can make them known to the court. The court grants the defendant an exception to all the remarks made by the court to the jury. Of course, gentlemen of the jury, as

stated in the written instructions, you are the sole and exclusive judges of all the facts in the case and the credibility of the witnesses, and I have no desire now, in anything I have said to invade the province of the jury."

On May 29th, the jury returned a verdict of guilty of burglary in the second degree, and on May 31st the defendant filed a motion for a new trial, which was heard and overruled on June 1st, and the defendant was sentenced to imprisonment at hard labor in the penitentiary for the term of five years, and from this judgment he appeals.

Wall & Brooks and *Willard Kline*, for appellant.

F. B. Daves, Attorney-General, *C. E. Branine*, County Attorney, and *Bowman & Bucher*, of counsel.

The opinion of the court was delivered by MARTIN, C. J.

1. It is strongly urged by counsel for defendant that the court erred in refusing to grant a continuance on account of his sickness and disability. The embarrassing and delicate duty of passing upon the defendant's physical and mental condition was devolved upon the court. The proceedings were very unusual, but we can not say that they were not justified by the situation, the good faith of the application for a continuance being challenged by the state. In *State v. Rhea*, 25 Kan. 576, 579, it was declared that

"Continuances are largely within the discretion of the trial court; and, before error can be affirmed, it must be shown that such discretion has been abused. It is not enough that conditions and circumstances are shown which would justify a postponement; there must be those which compel such postponement. Any uncertainty or doubt in this respect must be resolved in favor of the ruling below. Abuse of discretion is never presumed; it must be proved."

See, also, *Cushenberry v. McMurray*, 27 Kan. 328; *Krapp v. Hauer*, 38 Kan. 430, and *Harlow v. Warren*, 38 Kan. 480, where applications were made for continuances on the ground of the sickness of a party. In *Hottenstein v. Conrad*, 9 Kan. 435, 440, 441, it was held that whatever fact a court may inquire into on a motion it can also determine, and its determination establishes the fact for all the purposes of the motion. Upon the record, we can not say that the court erred in its

conclusion, nor that it abused its discretion in refusing to grant a continuance.

2. It is insisted that the court erred in admitting testimony over the defendant's objections. The prosecution offered to introduce in evidence some statements made by the defendant on the first trial by selecting and reading portions only of what was claimed to be his testimony, as shown on certain designated pages of the bill of exceptions. To this his counsel objected that a part of such former testimony could not be introduced against him, but that it must all go to the jury, and the court took this view of the case; and counsel for the State then proceeded, under protest, to read it all from the bill of exceptions transcribed from the stenographer's notes. The defendant then interposed the general objection that the testimony was incompetent, irrelevant and immaterial. The attorney for the State thereupon inquired of counsel for the defendant if he would admit that he was reading from the bill of exceptions filed by the defendant in the former trial, and counsel responded in the affirmative, but said that he still objected to the evidence as incompetent, irrelevant, and immaterial, which objection was overruled, and it is then stated in the record that counsel "reads to the jury the following testimony of G. W. Rogers, which is in words and figures as follows, to wit." And apparently all the testimony of the defendant on the former trial was here read to the jury. Doubtless, the testimony of a defendant in a criminal case in his own behalf on a former trial or examination may be offered in evidence against him, and the State is not required to read the whole of his testimony; but if that which is offered relates to any particular subject or fact, then all bearing on that subject or fact should be placed before the jury. (*State v. Sorter*, 52 Kan. 531, 540.) But the defendant had the benefit of the objection against the reading of a part only. The general objection made, however, by the defendant, was not obviated by that circumstance. The regular method of introduction of such evidence is to call the stenographer who transcribed the testimony from his notes, or some other person who heard the witness testify and knows that the bill of exceptions contains a correct statement of what he said from the witness stand, as in *Solomon Rld. Co. v. Jones*, 34 Kan. 443, 460. But where it is admitted, as in this case, that the document produced is

the bill of exceptions filed by the defendant in the former trial, and the record shows that counsel for the State reads to the jury the testimony of the defendant, any further identification of the testimony is unnecessary.

It was the theory of the prosecution that the crime was conceived by the defendant, and that he induced George H. Shirley to manage the destruction of the records, and that Shirley employed Harris, English and Riffle, three professional burglars, to do the work. G. O. Smith was working in Matthews' restaurant, which kept open day and night, and which Shirley often frequented in the night season; and Smith was called as a witness to testify to Shirley's conduct at the restaurant early in the morning that the offense was committed. The objection made to this testimony is that the crime had already been committed, and that evidence of Shirley's conduct thereafter was inadmissible against his co-defendant, who was being tried separately; but the record shows that the peculiar conduct of Shirley, testified to by the witness, was about four o'clock in the morning, and this is just about the time that the professional house breakers were engaged in their desperate business. The defendant also complains of the admission of the testimony of Thomas Carroll, who had been solicited by Shirley to assist him in destroying the records. It is said that there was no proof that any conspiracy had been formed at that time to which Rogers was a party. He testified that Shirley said he would see his partner, and it is claimed that this was inadmissible for the purpose of showing that a conspiracy then existed. It is true that such testimony would not be admissible for that purpose, but evidence was given on the trial tending to show that the conspiracy between the defendant and Shirley was formed before that time. The testimony of the witness, H. W. Black, as to a conversation with Shirley at Wichita, wherein Shirley inquired if he knew where he could "get a man to do some dirty work," is complained of, but it was admissible for the reasons above indicated. And these objections to the testimony of Smith, Carroll and Black were substantially disposed of when the case was here before.

3. The next complaint respects the giving and refusal of instructions. No. 24, as given, reads as follows:

"You are instructed that before you are warranted in finding the defendant guilty, each of you must be able to truthfully

and conscientiously say that his guilt has been established by the evidence in the case beyond reasonable doubt; and if, after a consideration of the whole case and consulting with your fellow jurymen, any one of the jurors entertains a reasonable doubt as to whether defendant's guilt has been established, you can not convict the defendant; but you can not acquit the defendant unless all the jurors entertain a reasonable doubt."

The last clause is severely criticised, counsel saying that this would compel a person charged with the commission of an offense, in order to secure an acquittal, to establish a reasonable doubt of his guilt in the minds of each juror; and they asked an instruction to the effect that if a single juror entertained a reasonable doubt, then the defendant must be acquitted. That the instruction asked was erroneous is settled by the case of *State v. Witt*, 34 Kan. 488, and we can conceive of no valid objection to the instruction as given, and this notwithstanding the case of *Stitz v. State*, 104 Ind. 359, 362. In that case the court below instructed the jury that, "while each juror must be satisfied of the defendant's guilt beyond a reasonable doubt to authorize a conviction, such reasonable doubt, unless entertained by all the jurors, does not warrant an acquittal." And the Indiana Supreme Court concludes, from a process of reasoning incomprehensible to us, that "this must have induced the jurors to think that, unless all concurred in entertaining a reasonable doubt, the verdict should be against the defendant." We can not see that it meant anything more than that the verdict, either of conviction or acquittal in a criminal case, must be the result of the concurrence or running together of the minds of all the jurors. If the minds of the jurors do not so concur, there must be a disagreement. But it is hardly necessary to instruct an American jury touching their right to disagree, for this is universally understood. Some of the other instructions given are criticised, it being said that the court assumed the guilt of Shirley, which was a step necessary to establish the guilt of the defendant; but we do not think that the language of the court is subject to this construction. And there was no error in the instruction that, in determining the weight and credibility of the evidence of the defendant, they should consider his motives and his testimony the same as the other witnesses. If the instruction had singled out his motives alone, perhaps the word "may," ought

to have been used rather than "should;" but when the defendant was referred to, only as one of the witnesses, and his motives were spoken of in the same connection, we can not say that the language used was erroneous or prejudicial. The defendant asked certain instructions to the effect that, if the facts and circumstances relied upon by the State to establish guilt could be reasonably explained upon the theory of the guilt of some person other than the defendant, then he must be acquitted. This would have been error, prejudicial to the State, for the proof of the guilt of Harris, English, Riffle and Shirley was much more direct and positive than the evidence of the guilt of the defendant; and it was necessary to prove their guilt before that of the defendant could be established. This, however, would constitute no good reason for the defendant's acquittal. Another instruction asked was upon the force of circumstantial evidence, and embodied the proposition that, in order to authorize a conviction, all the circumstances must be consistent with each other. Minor circumstances may be in evidence which are inconsistent with each other, and yet, if the jury can say upon the evidence that all the circumstances are consistent with the defendant's guilt, and inconsistent with any other rational conclusion, a jury may be warranted in returning a verdict of guilty. There was no material error in the giving or refusing of instructions, which seem to have been drawn carefully, with a view to the protection of all the rights of the defendant.

4. The practice of calling in a jury, and lecturing them upon the desirability of an agreement, although obtaining to a considerable extent in this State, is not to be commended. Jurors very generally understand the importance of agreement, and the inconvenience and expense of another trial. It is presumable that, in their arguments pro and con for many hours together, they chide each other sufficiently, and they ought not to be visited with a scolding by the court because differences of opinion still remain. In this case, however, the oral remarks of the court seem to have had no immediate or early effect, for there was no verdict until the next day; and upon considering the language of the court, we can not see enough in the remarks to induce us to believe that they were efficacious in producing an agreement. The language is compared with that used in *State v. Bybee*, 17 Kan. 462, 464, 465, but there is little resemblance;

and under the circumstances of this case we would not feel warranted in ordering a reversal, as the remarks contain nothing in the nature of instructions, unless at the close, and this was at most but a harmless repetition.

5. It is argued that the conviction was erroneous and illegal, because the term at which the trial commenced ended by operation of law, and another term commenced in Harvey county, on May 21, 1895. It was held in *Re Millington*, 24 Kan. 214, that courts can not be legally held at the same time in two counties of the same judicial district. But the district court of one county is not prohibited from adjourning to a time beyond the regular term in another county of the same district. (*State v. Montgomery*, 8 Kan. 351, 356.) And in *State v. Palmer*, 40 Kan. 474, 478, the court in one county was adjourned to a time one day subsequent to the commencement of the term in another county of the same district, which latter term was on the first day adjourned to a time beyond the adjourned term of the former county; and this practice was held proper. This case would be exactly in point here if the oral statement of the trial judge should be taken as evidence, but this is objected to. We hold, however, that, in the absence of any showing that the court was held in Harvey county on May 22d, and the following days of the trial of this case, the defendant's objection to the regularity of the term can not be sustained.

6. It is said that the court erred in failing to admonish the jury on the adjournment of Saturday, May 25th, as required by statute. The record does not affirmatively show whether the admonition was given or not; and the presumption, in the absence of anything in the record, is that the court discharged its duty in admonishing the jury before they were allowed to separate. (*Linton v. Housh*, 4 Kan. 535, 539; *State v. Palmer*, *supra*.) We find no substantial error in the record prejudicial to the defendant, and the judgment of the court below must be affirmed. All the justices concurring.

NOTE.—*Breaking premises to take possession of property under claim of ownership.*—The defense in a criminal case charging the defendant with breaking and entering a building with intent to steal a mule, was that the breaking and entry were made with no criminal intent, but in good faith to take possession of the mule, believing him to be the property of the defendant. The State read in rebuttal the record of a proceeding in replevin for the mule in a justice of the peace court, begun by defendant against the person in possession of the animal. From this record it appeared that

the case was dismissed for want of prosecution. The defendant, in his statement before the jury, had given a parol statement about the same proceeding. The record was objected to as being irrelevant and immaterial. *Held*, that the objection was properly overruled; that evidence tending to prove a voluntary abandonment by the defendant of his suit for possession of the mule tended to contradict his statement of good faith and honest belief that it was his property. *Charles v. State*, 38 Fla. 691.

Same.—Where a question is involved in a criminal case as to the ownership of property, which the defendant is charged with an intent to steal, evidence tending to show that a person alleged in the indictment to be the owner of the property, and admitted by the defendant to have formerly been the owner of the same, was induced to part with the possession by fraudulent misrepresentations, and that he would not have parted with the same except for such misrepresentations, is admissible, as tending to show that the mule still remained the property of the former owner, unless the defendant were a *bona fide* purchaser for value, without notice of the fraud. *Id.*

Same.—The court charged the jury, among other matters, that it was a question for them to decide whether "the defendant in good faith, honestly believed the mule to be his property, as a reasonable and prudent man." This charge was erroneous. The court should not have limited the defendant to such good faith and honest belief as would be entertained by a reasonable and prudent man. The law deals only with the intention, and a man is not to be punished when he has no guilty intention, and acts in good faith and with an honest belief, although he may not have acted as a reasonable and prudent man in having such faith and belief. *Id.*

The decision of the Supreme Court of Florida, in respect to the law stated in the last paragraph, is sustained by reason and supported by abundant authority. But the decision in the Kansas case is supported neither by reason nor authority.—Ed.

SCOTT V. STATE.

(91 Wis. 552.)

BURGLARS' TOOLS: *Possession of—Information—Sufficiency—Prosecuting Attorney—Prejudicial Remarks.*

1. Under laws of Wisconsin making the possession of burglars' tools, adapted to break open places of deposit in order to take therefrom any money or property, with intent to use them for such purpose, an offense, an information alleging possession with the intent to break open places of deposit in general, and take property therefrom, without specifying any particular place or property, is sufficient.
2. Where there is evidence by the prosecution that, on arrest of defendant while stealing a ride on an express train, the tools were found concealed in his pants and shoes; that the tools form a complete burglars' kit, except the brace, which is always obtained at the place of operation; and by defendant that he found the tools—a refusal to take the case from the jury is proper.

3. Where the only evidence is that defendant, when arrested, had all the tools usually carried by burglars, concealed on his person, and no evidence that he has ever been convicted of theft, an assertion in argument by the prosecuting attorney that defendant is a thief, and a ruling by the court that it is warranted by the evidence, is ground for reversal.

Error to review a judgment of the municipal court of Milwaukee county; Emil Wallber, Judge. Reversed.

Patrick Scott was convicted of having burglars' tools in his possession, with intent to use them, and brings error. Reversed.

This was an information in the municipal court of the county of Milwaukee, charging that on the fourteenth day of December, 1894, at the county of Milwaukee, the plaintiff in error, Patrick Scott, unlawfully, feloniously, and knowingly did have in his possession certain machines, tools and implements—that is to say, steel drills, skeleton keys, and other tools and implements adapted and designed for cutting through, forcing, or breaking open rooms, buildings, vaults, safes or other depositories there situate, in order then and there unlawfully and feloniously to steal, take and carry away therefrom such money and other property capable of being stolen as might be found therein; he (the said Patrick Scott), at the time he had said machines, tools and implements in his possession as aforesaid, well knowing the same to be adapted and designed for the purposes aforesaid, and with the intent then and there, unlawfully and feloniously, to use or employ the same for the purposes aforesaid. The defendant's counsel moved to quash the information, on the ground, among others, that it was indefinite; that, in order to make the averment of intent good, it was necessary to charge that the defendant intended feloniously to steal, take and carry away from the owner thereof, money or other property found in such building, room, etc., but the motion was denied.

After the plea of not guilty, it appeared at the trial that the defendant, with two others, who were with him, had recently been arrested at the railroad station in Milwaukee, and had been taken from the front end of an express train from Chicago, upon which they had clandestinely ridden from that city. Upon searching the defendant the officers found down his pants legs, and sticking down in his shoes, two small drills, two large drills, three skeleton keys, and other implements

produced in evidence. Testimony was given to the effect that for any complete burglars' outfit, as for a man that would blow safes, drills, skeleton keys, hooks, etc., would be sufficient, the only things lacking would be a bit and brace, not usually carried, being too heavy, and usually procured at the place of operation, and that the said tools were such as were used in opening doors, drilling locks and for safe work. The parties all claimed to be bridge builders, and that they came to Milwaukee to get work. The two others arrested with the defendant were discharged. The defendant claimed that he found the tools, etc., near Chicago, at Lamont, while walking along the road; that they were scattered along the roadside; and that he picked them up, and had carried them ever since. He admitted that they were not such tools as were used by bridge builders.

After other evidence had been produced, the State rested, and the defendant's counsel moved that he be discharged on the ground that the State had failed to prove the offense charged. The trial judge denied the motion, saying, "I think there is evidence enough to have the case go to the jury;" and he refused to direct an acquittal.

In the closing argument of the district attorney to the jury, he made the statement: "From the testimony in this case, it appears that two men who came here with him (the defendant) are just as big thieves as this defendant." The defendant's counsel objected to the statement, and the district attorney responded: "I will take it back, if it makes it any better, and say that I do not know as they are quite as big thieves as he is." The defendant's counsel renewed his objection, and the court ruled "that the remarks of the district attorney were warranted by the evidence." After conviction and sentence, the defendant sued out this writ of error.

J. J. McAuliffe, for plaintiff in error.

John L. Erdall, Assistant Attorney-General, for the State.

PINNEY, J. 1. Chapter 63 of the laws of 1893, provides that "every person who shall knowingly have in his possession any engine, machine, tool, or implement adapted and designed for cutting through, forcing or breaking open any building, room, vault, safe or other depository in order to steal therefrom any

money or property knowing the same to be adapted and designed for the purposes aforesaid, with intent to use or employ the same for the purposes aforesaid, shall be, on conviction thereof, punished," etc. The intent essential to constitute the offense, is the intent to use or employ such implements or tools for the purpose of cutting through, forcing, or breaking open any building, room, vault, safe, or other depository, in order to steal therefrom any money or property; and this is clearly and plainly charged in the information in the very words of the statute. As the offense is a statutory one, the information thus charging it is sufficient. The intent specified in the statute is to accomplish a certain result in order, or so that the accused may steal from any building, room, or safe, etc., money, etc., and it was enough to allege possession of such tools, etc., with the intent specified and in the language of the statute. In *Com. v. Tivnon*, 8 Gray, 375, 380, under a statute the same in terms as the present, it was held that "the general intent was sufficient, and it was not necessary to allege or prove any intent to use the tools in a particular place, or for a particular purpose, or in any definite manner." From the very nature of the offense it would, in general, be impossible to allege or show an intent to deprive any particular owner of his property. The objection to the information was rightly overruled.

2. The court properly ruled that there was evidence sufficient to require that the case should be submitted to the jury, and for that reason denied the motion to discharge the defendant and direct an acquittal. In the ruling of the court upon the objections to the remarks of the district attorney, we think the trial judge committed a serious error, requiring a reversal of the judgment and a new trial. The statement of the district attorney in his closing argument was not by way of legitimate argument, but by assertion of a fact, stated quite explicitly, that the defendant was a thief, and that the two men who came to the city with him "were just as big thieves as this defendant;" and, when objection was made, he reiterated the charge, saying: "I will take it back if it makes it any better, and say that I do not know as they are quite as big thieves as he is." The bill of exceptions purports to contain all the evidence given on the trial, and we find nothing in the bill to warrant the assertion of the district attorney, which went to the jury with the sanction of the opinion of the

court in its favor, to the effect that "the remarks of the district attorney were warranted by the evidence."

There was no evidence that the defendant had ever been convicted, or had ever been guilty of larceny. He was on trial for having tools, implements, etc., in his possession, in order to steal from buildings, rooms, safes, etc., such money or property as he might find therein, and with intent to unlawfully use and employ said tools for such purposes. Whether he had possession of them for that purpose and with that intent, was a vital question, entirely for the jury upon the evidence. The fact that he had them secreted in the legs of his pants and in his shoes, was evidence from which the jury might or might not infer the criminal purpose alleged. The repeated assertion of the district attorney that the defendant was a thief, followed by the ruling of the court that it was warranted by the evidence, could not but have exercised a decided influence upon the jury. The defendant was entitled to a trial upon the evidence produced, unaffected by the statement of extrinsic facts or extraneous considerations. The effect of the ruling in question was to impair that right, and to improperly and unfavorably affect his case before the jury. For this reason there must be a new trial.

The judgment of the municipal court is reversed, and the cause is remanded for a new trial.

The keeper of the house of correction for Milwaukee county will deliver the defendant to the sheriff of Milwaukee county, who will receive and keep him in his custody until discharged therefrom by due course of law.

NOTE.—*Indictment for burglary—Sufficiency of.*—Pen. Code, California, provides that, in cases where the indictment charges a previous conviction, and defendant has confessed the same, the clerk, in reading it, shall omit therefrom all that relates to such previous conviction. *Held*, that it was error to admit testimony tending to show a previous conviction, defendant having confessed the same. *People v. Thomas*, 110 Cal. 41.

Variance, between the description of a house, in an indictment charging that defendant, at N., in the county of H., broke and entered the house of C., "there situate," and stole therefrom, and evidence that the house was in H., in the same county, is fatal. *State v. Kelley*, 66 N. H. 577.

An indictment charging the breaking, entering and stealing from the house of C., situate at N., in the county of H., can not, without submission to the grand jury, be amended by alleging that the house was in H., in the same county, this being a matter of substance, and not of form, as to which amendment is allowed by Gen. Laws, New Hampshire. *Id.*

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Where an indictment for burglary alleged that the accused broke and entered a storehouse with the intent to commit the larceny of a "five gallon keg of whisky, of the value of \$15," and there was ample evidence to show the breaking and entry by the accused and the actual larceny by him from that house of a keg of whisky containing five gallons, and also that the same was of some value, the case was sufficiently made out, without further proof as to value. *McCrary v. State*, 96 Ga. 435.

In an indictment predicated upon revised statutes of Florida, for the breaking and entry in the night time or in the day time of any other building than a dwelling house, or other house within the curtilage of a dwelling house, with intent to commit a felony, it is not necessary expressly to allege that such building is not a dwelling house, or house within the curtilage of the dwelling house; but, when the building entered does not belong to the dwelling house class, it is sufficient to describe it in the indictment by any apt words of description showing that it is a building, such, for example, as "storehouse," "office," "shop," and the like—which general description will sufficiently negative the idea that such building may belong to the dwelling house class. *Rimes v. State*, 36 Fla. 691.

In an indictment for burglary, allegations as to the ownership of the goods stolen from the building may be treated as surplusage, and therefore the failure to prove such ownership as alleged is not ground for reversal. *Brown v. State*, 72 Miss. 997.

(Queen's Bench Division.)

LOWE v. VOLP.

(18 Cox's Crim. Cas. 253.)

BY-LAWS: *Reasonableness—Validity—Tramway company—Passenger required to show ticket if any—Tramway Act, 1870 (33 and 34 Vict. c. 78, s. 46).*

1. A tramway company, under the powers of Sect. 46 of the Tramways Act 1870, made the following by-law: "Each passenger shall show his ticket (if any), when required so to do, to the conductor or any duly authorized servant of the company, and shall also, when required to do so, either deliver up his ticket or pay the fare legally demanded for the distance traveled over by such passenger." A further by-law imposed a penalty for breach of any of the company's by-laws.
2. The respondent refused to show his ticket when asked to do so by an inspector of the company, but gave a number which was the number of the ticket which he had received from the conductor of the company. He had duly paid his fare, and had no intention to defraud, and had not in fact defrauded the company. *Held*, that the by-law was reasonable and valid, and the respondent ought to be convicted of a breach of it.

Case stated by one of the metropolitan police magistrates.

At the hearing the following facts were proved or admitted :

The appellant, Ernest Lowe, an inspector of the South London Tramways Company, entered one of the cars of the company in which the respondent, P. T. Volp, was traveling, and asked the latter to show him his ticket. The respondent refused to show the ticket, but gave the inspector a number which was the number of the ticket which he had received from the conductor. The respondent had duly paid his fare, and in refusing to show his ticket had no intention to defraud, and did not in fact defraud, the appellant company. No alternative demand was made by the company's officials for the fare on non-production of the ticket by the respondent.

The appellants contended that the respondent was liable to a penalty not exceeding 40s. under by-law 22 of the company's by-laws, for refusing to show his ticket in conformity with by-law 10.

By-law 10 is as follows :

"Each passenger shall show his ticket (if any), when required so to do, to the conductor or any duly authorized servant of the company, and shall also, when required so to do, either deliver up his ticket or pay the fare legally demandable for the distance traveled over by such passenger."

The learned magistrate was of opinion that, assuming the by-law to be valid in law, the reasonable construction of it required it to be read as giving to the respondent the alternative of either showing his ticket or paying the fare, and this alternative was not offered to him. If this construction were wrong, then the by-law was unreasonable as offering no alternative, and therefore bad. He was further of opinion that the by-law was invalid, and not authorized by the power to make by-laws conferred by Sect. 46 of the Tramways Act, 1870, in that no power is given by that statute to the company by means of by-laws to impose penalties upon their passengers for an act which, at most, would be a breach of contract, and not fraudulent. The learned magistrate therefore dismissed the summons.

Spokes (W. Hume-Williams with him) for the appellant.
F. Watt, for the respondent.

LINDLEY, L. J. It appears to me that this case is really covered by authority. The learned magistrate has refused to convict the respondent, who was summoned for breach of a by-law made by the tramway company under the powers of Sect. 46 of the Tramways Act, 1870. That section authorizes the promoters of any tramway to make regulations for regulating the traveling in or upon any carriage belonging to them; and a later section allows a reasonable penalty to be imposed. The company accordingly made this by-law: (The learned judge read the by-law as set out above, and proceeded:) I agree with Mr. Watt that that may be regarded as two by-laws in one clause. The first part is, that the passenger shall show his ticket (if any) when required; and, the second is, that he shall deliver up his ticket when required or pay the fare. Now, this second part has been before the Court on more than one occasion, especially in the case of *Heap v. Day* (*ubi sup.*), and in a case, *Hanks v. Bridgman*, decided in this court a few days ago, in which we followed *Heap v. Day*. Now, the only argument in favour of the respondent which has struck me as being of value is, that a company has no power to impose a duty upon its passengers merely in order to check the honesty of its own servants. But that argument was really disposed of in *Heap v. Day*, and we can not sitting here overrule that case. Now, the learned magistrate, having found as a fact, that Mr. Volp did refuse to show his ticket, gives three reasons for refusing to convict him. He was of opinion, in the first place, that the proper construction of the by-law required it to be read as giving the respondent the alternative of either showing his ticket or paying the fare, and this alternative was not given to him. With deference to the learned magistrate, I am unable to read the by-law in any such way. I can not tack on the alternative "pay the fare legally demandable" to the first clause of it: "Each passenger shall show his ticket (if any)." The words "if any," are very important. There is no alternative given there.

The alternative of paying the fare is confined to the second clause of the by-law, in which the passenger is required to give up his ticket or pay the fare; but it has nothing to do with the first clause. I think, therefore, the learned magistrate has misconstrued the 10th by-law. Then his second reason is, that, if the by-law is not to be construed as giving the passenger the

alternative, it is unreasonable and bad. But, again, I do not see anything unreasonable in imposing a small penalty on a man who has a ticket but refuses to show it. The only conceivable reason for so holding is that already alluded to, which was negatived in *Heap v. Day*; and we have the express opinion of Lush, J., in *Saunders v. The South Eastern Railway Company* (*ubi sup.*), that such a by-law would be perfectly reasonable. The learned magistrate's second reason seems to me, therefore, untenable. Then his third ground was, that the company had exceeded their powers under Sect. 46 of the Tramways Act, 1870, "in that no power is given by the statute to the company by means of by-laws to impose penalties upon their passengers for an act which at most would be a breach of contract and not fraudulent." That ground was supported by reference to *Saunders v. South Eastern Railway Company*, *Haven v. North Eastern Railway Company*, *Dyson v. London and North Western Railway Company*, and *Bentham v. Hoyle*. But looking at these cases, we see that in every one of them the statute dealt with precisely the same case as the by-law, and the by-law omitted words in the statute which were necessary for the protection of the subject. But Sect. 51 (the penalty clause) of the Tramways Act has no such language, and we have the authority of *Heap v. Day*, that at all events the second part of this by-law is reasonable for regulating the traffic in or upon the tramway. On all these grounds I think the learned magistrate was mistaken, and the appeal must be allowed.

KAY, L. J. I am of the same opinion. I can not agree with the construction put upon the by-law by the learned magistrate. It appears to me obvious that the alternative of paying the fare legally demandable, applies only to the second part of the by-law, and can not apply to that part which deals with the passenger showing his ticket. Now, it is contended that that is an unreasonable by-law. In *Heap v. Day* it has been held to be a good by-law as regards the second part of it. But, no doubt, the first part was not specially considered in that case, and therefore it is open to Mr. Watt for argument. Now, the matter arises thus: Sect. 51 of the Tramways Act provides for a penalty on any passenger who wilfully attempts to avoid paying his fare, or wilfully refuses to

leave the car at the end of the journey for which he has paid. Then section 46 gives the promoters of any tramway power—subject to this Act—to make regulations for regulating the traffic, and by-laws for enforcing the same. I agree that if this by-law were to the effect that if a passenger did not pay his fare he should be liable to a penalty, and omitted the words in the statute which show that the penalty was only imposed by statute on a person who wilfully omitted to pay, that would be creating a new offense and imposing a penalty in circumstances where the statute plainly did not intend there should be one. But is that the purpose of this by-law? I do not think it is at all. This is strictly a by-law made, to take the words of the statute, “for regulating the traveling in or upon any carriage of the company.” Now, a passenger when he pays his fare gets a ticket from the conductor. The company can certainly make a by-law to compel the conductor to give a ticket, and he does give one. Then an inspector may call upon a passenger to show his ticket, and the by-law says he shall show it, “if any,” when required so to do, to the conductor or any duly authorized servant of the company.

It is well known that companies have a check upon their servants, by employing inspectors to ask passengers to show their tickets. This by-law, no doubt, was made for that purpose. Or the conductor himself may forget if he has given a passenger a ticket, and may wish to see it. But the passenger is only obliged to show it, “if any,” which means, of course, if he has one to show. He may have lost his ticket, and in that case could not show it. But why is this by-law unreasonable? It does not, in the least, carry any further the right of the company to proceed against a passenger for not paying his fare. It is a by-law to regulate the traffic, and I should think to give the company a check upon the conductor, and the passenger ought to be liable for breaking it. But then it is said everything ought to be presumed in favor of a person charged with a criminal offense, and it should be inferred that the man had lost his ticket. I can not agree to that. The language of the case is entirely against it. If he had lost his ticket he would have said so. The case expressly finds that he refused to show it. I can only judge that he wanted to test the question whether he was obliged to show his ticket. In my opinion he is obliged. I think this is a perfectly reasonable by-law. It

does not infringe the statute or extend the law as to the payment of fares beyond Sect. 51. I think the learned magistrate was wrong, and that he ought to have convicted.

Blyth, Dutton, Hartley & Blyth, solicitors for the appellant.
E. R. Oliver, solicitor for the respondent.

NOTE.—*Ordinance prohibiting stabling of more than two horses void.*—An ordinance of the council, prohibiting the stabling of more than two horses, except by those obtaining permission of the council, is unequal in its operation, and hence void, because repugnant to the fourteenth amendment of the Constitution of the United States. *Wo Lee v. Hopkins*, 118 U. S. 356; *State v. Mahner*, 43 La. Ann. 496; *State v. Kuntz*, 47 La. Ann. 106.

State board of health—Validity of regulation—Piggens near dwellings.—A regulation by the state board of health of Vermont, authorized by act 1886, as amended by act 1892, to enforce such regulations for the preservation of the public health in contagious diseases, and regarding the causes tending to their development, as shall be deemed proper, prohibiting the maintenance of piggens within one hundred feet of any dwelling or well or spring used for drinking, irrespective of the locality where, or the manner in which they are conducted, is unreasonable and invalid. *State v. Spuyn*, 67 Vt. 502.

Commenting upon the case, Mr. Justice Start says: "It can not be said that all piggens situated within one hundred feet of a well or spring of water used for drinking purposes, or within one hundred feet of a street or inhabited house, endanger public health, or that there are reasonable grounds for apprehending that they do. They may or may not thus endanger the public health. Very much depends upon the manner of construction, the way they are kept and occupied, the means for keeping them clean, the location and surroundings, the character and slope of the land, their nearness to, or remoteness from thickly settled communities, and the existence or non-existence of diseases and causes of diseases. A pigpen may be a menace to public health when situated in a city or village, and perfectly harmless when situated upon a farm; and the fact that a pigpen situated in a city or village is a nuisance, and endangers public health and ought to be abated, furnishes no reasonable ground for abating a pigpen upon a farm, which is not a nuisance, and in no way affects the public health. The regulation is intended to have force and effect throughout the entire State. It affects alike those piggens which are, as a matter of fact, maintained in such a manner as to be offensive, and those which are maintained with every possible degree of cleanliness; it affects alike those situated upon farms and those situated in thickly-settled communities; and it affects all piggens within the prohibited limit, without reference to the existence or non-existence of epidemic or contagious diseases, and the causes which tend to their development and spread, in any particular locality."

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STATE v. WILLIAMS.

(72 Miss. 992.)

CARRYING CONCEALED WEAPONS: *United States Marshal.*

The code of Mississippi provides that a peace officer or deputy, in discharge of his duties, shall not be punishable for carrying concealed weapons. Rev. St. U. S., § 788, provides that marshals and their deputies shall have in each State the same powers in executing the laws of the United States as the sheriffs in such State may have in executing the laws thereof. *Held*, that a deputy marshal, acting within his district, had the right to carry such weapon in the execution of a warrant for an arrest.

Appeal from Circuit Court, Chickasaw County; Newnan Cayce, Judge.

O. C. Williams was indicted for carrying concealed weapons, and acquitted. The State appeals. Affirmed.

On the trial Williams testified that at the time he was seen with the concealed weapon, he was a deputy United States marshal, and was on his way to arrest a man for whom he had a *capias*. The district attorney objected to this testimony, also to the introduction of the *capias* alluded to, because a deputy United States marshal did not come within the exception of the statute against carrying concealed weapons. The court overruled the objection. The jury were instructed by the court that if they believed from the evidence that the defendant, at the time he carried the concealed weapon, was acting in the discharge of his duties as deputy United States marshal, and had a *capias* in his possession, to arrest the parties therein named, they should acquit.

Frank Johnston, Attorney-General, for the State.

WHITFIELD, J. The appellee was a regular deputy United States marshal for the eastern division of the northern district of Mississippi, and was at the time of his arrest, acting within the said division and district, in the execution of a warrant for the arrest of one Fayette Hill. Under such circumstances, he had the right, as a peace officer, within paragraph c, section 1027, Code 1892, to carry the weapon. This is clearly settled by *The Tug Gorgas*, 10 Ben. Adm., 460, 471, and *Gwin v. Breedlove*, 2 How. (U. S.) 29. Rev. St. U. S., § 788, provides that "the

marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof." One view of this statute, originally enacted July 29, 1861 (12 Stat. 282), is that it merely confers on marshals and their deputies such powers of sheriffs and their deputies as they had in their respective States at the date of this enactment, July 29, 1861; that the act confers upon such marshals and their deputies, in addition to the "powers conferred upon them by the laws of Congress and the rules and practice of the courts," the aforesaid powers of sheriffs and their deputies, and that no restrictive State statute, passed after July 29, 1861, could take away any powers conferred by said act. This is the view adopted in *The Tug Gorgas, supra*. The other view regards this section 788 (Rev. St. U. S.) as conferring upon marshals, within their respective States, "such powers in executing the laws of the United States, as by the laws of the same States are, from time to time, conferred upon sheriffs to execute the laws of the State, making the provision perambulatory," and this, we think, clearly the sounder construction. Under either construction, however, the charge in this case was correct. See, further, Gould & Tucker's Notes on Rev. St. U. S., p. 230, § 788. The point presented by this appeal is wholly different from that in *Ex parte Clem Lea*, in which the writer of this opinion was the counsel for the State. There the deputy United States marshal was outside his district and in a different State. Affirmed.

NOTE.—*The intent*.—The criminal intent in the offense of carrying concealed weapons, is the intent to carry the weapon concealed; and where defendant had a right to carry the weapon openly, but concealed it about his person, a conviction will not be disturbed, in the absence of evidence satisfactorily explaining the concealment. *State v. Pigford*, 117 N. C. 748.

STATE V. KINDIG.

(55 Kas. 113.)

CHANGE OF VENUE: *Record must show that defendant requested or consented to change.*

1. Where a change of venue of a cause is actually made by a district court to some other county in the same district, upon the written application

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- of the defendant that he can not have a fair trial therein, such order is not fatally defective because it omits to specify the cause of removal.
2. Where a criminal cause is properly removed for trial from one county to another county in the same judicial district, the district court, having jurisdiction of the cause by such removal, may try the defendant upon a certified transcript of the record and proceedings.
 3. Section 10 of the bill of rights guarantees to the accused in a criminal cause a trial by a jury of the county or district in which the offense is alleged to have been committed. This constitutional right may be waived with the consent of the accused, and, unless the removal of the cause to a county in a different judicial district is clearly shown by the record to have been made with the consent of the accused, the removal is without any authority of law.
 4. The record in this case examined, and held not to show that the accused waived his constitutional right to be tried within the judicial district in which the offense with which he is charged is alleged to have been committed.

Appeal from District Court, Thomas County; Charles W. Smith, Judge.

R. O. Kindig was convicted of receiving a deposit for his bank, knowing the bank to be insolvent, and appeals. Reversed.

On the 7th of October, 1893, an information was filed in the District Court of Decatur County, charging R. O. Kindig, as cashier and manager of the State Bank of Oberlin, with having, on the 12th of July, 1893, unlawfully received a deposit of \$63.25 for said bank, when he knew the bank at that time was insolvent. At the October term of the court, for 1893, of Decatur county, the State, with leave of the court, filed an amended information. Thereupon the defendant filed his written application for the court to grant him a change of venue to the district court of some other county, in the Seventeenth Judicial District, upon the ground "that the minds of the inhabitants of the county of Decatur, the county in which the said case is now pending, are so prejudiced against the defendant that a fair trial can not be had therein." This application was supported by twenty-five affidavits. After hearing the application, and being fully advised thereof, the court made the following order: "The venue of said cause is changed to Cheyenne county, in said Seventeenth Judicial District, and the trial of said cause is set for the November, 1893, term of said district court sitting in and for said county and State." The trial of the case was continued from the November term of 1893, to the April term of 1894.

At the April term of the District Court of Cheyenne county for 1894, and on the 5th day of April, the venue was changed from Cheyenne county to Thomas county in the Thirty-Fourth Judicial District. The record on that point reads: "Counsel for defendant thereupon called the court's attention to paragraph 5238, Gen. St., Kan., and especially to the third clause thereof, viz., that the court had heretofore been counsel for the State in said cause. Thereupon it appearing to, and being within, the knowledge of the judge presiding and the court that, theretofore, as county attorney of Decatur county, Kansas, where said cause was originally begun and filed, as such officer, he had verified, filed the information therein, and acted as counsel for the State in the said cause, therefore, and for such reasons, it is ordered, considered and adjudged by the court that the venue in said cause be changed to the county of Thomas, in the State of Kansas, the same being within the Thirty-Fourth Judicial District of the said State. And it is further ordered by the court that the clerk of the District Court in and for Cheyenne county, Kansas, forward, forthwith, to the clerk of the District Court of Thomas county, Kansas, a true, correct and complete transcript of all pleadings, complaints, informations, recognizance, and records of said cause. To which order of the court the defendant then and there asked an exception to be entered." At the June term of the court for Thomas county, for 1894, when the State attempted to offer evidence, the defendant objected to the introduction of any testimony, upon the ground "that the court had no jurisdiction to hear and try the case, and also upon the ground that the jury were not impaneled from the county or district in which the offense was alleged to have been committed." This objection was overruled. On the 23d day of June, 1894, the jury returned a verdict of guilty against the defendant. Subsequently the defendant filed a motion in arrest of judgment, and also for a new trial. These motions were overruled. The court sentenced the defendant to confinement to the State penitentiary for the period of three years, and also adjudged that he pay the costs of the prosecution. The defendant appeals.

Bertram & McElroy and J. R. Hamilton, for appellant.

John T. Little, Attorney-General, and C. Angevine, for the State.

HORROX, C. J. (after stating the facts). It is insisted that the District Court of Cheyenne county had no jurisdiction of this case on a change of venue from Decatur county because the order of removal was made prior to any plea to the information, and because the removal did not specify the cause therefor. Section 179 of the Criminal Code, reads:

"Every order for a removal of any cause, under the foregoing provisions, shall state whether the same is made on the application of the party or on facts within the knowledge of the court or judge, and shall specify the cause of removal, and designate the county to which the cause is removed."

1. It is claimed upon the part of the State, that a plea of not guilty was entered before the application for removal of the cause was granted, but that the plea was unintentionally omitted from the record. This, however, is immaterial. It is held to be better practice to arraign the defendant and require him to plead to the information before making an order for a change of venue; but, where the defendant applies for the change, and has the benefit of arraignment in the county to which the cause is transferred, he has no right to complain that the change was made before his arraignment. *Hudley v. State*, 36 Ark. 237. See, also, *Ex parte Cox*, 12 Tex. App. 665. As the removal was actually made upon the application of the defendant, and as he had the benefit of arraignment in Cheyenne county, there was no material error in transferring the case to that county for trial before the plea was entered. *State v. Potter*, 16 Kan. 80. The better rule is that the statute should be literally complied with, and the ground for a change be fully spread on the record. But it appears in this case that the removal was actually made upon the written application of the defendant, and the showing made by him upon affidavits that he could not have a fair trial in the county where the information was filed. The application of the defendant for a removal of the cause must be read in connection with the order of the court granting the same, and therefrom it appears that the removal was allowed upon the application of the defendant, and for the cause specified therein.

2. It is next insisted that the District Court of Cheyenne county committed error in entertaining jurisdiction of the cause after removal, and requiring the defendant to plead to a certified transcript of the information. Not so. Nothing but

a transcript of the record and proceeding is authorized to be transmitted by the district clerk to the county to which the case is removed. *State v. Riddle*, 20 Kan. 711.

3. It is further insisted that the removal of the cause from Cheyenne county, in the Seventeenth Judicial District, to Thomas county, in the Thirty-fourth District, was without authority of law. By section 10 of the Bill of Rights, a defendant in a criminal cause is guaranteed a trial by a jury of the county or district in which the offense is alleged to have been committed. Undoubtedly the provision securing to the accused a public trial, within the county or district in which the offense is committed, is of the highest importance. It prevents the possibility of sending him for trial to a remote district, at a distance from friends, among strangers, and perhaps parties animated by prejudices of a personal or partisan character. But a defendant may waive his constitutional right or personal privilege by his consent. *State v. Potter*, *supra*; *In re Holcomb*, 21 Kan. 628. Upon the part of the State, it is insisted that the removal of the cause from Cheyenne county to Thomas county was made with the consent of the defendant, and that he can not now complain. But we do not so read the record. The defendant did not make any written or oral application for the removal of the cause to Thomas county or to any different district. After the cause had been removed to Cheyenne county, counsel for the defendant called the court's attention to section 173 of the Criminal Code, and especially to the third subdivision thereof, which provides for transferring a case to a different district, "where the judge is in anywise interested or prejudiced or shall have been counsel in the cause." But when the court made an order removing the case to Thomas county, the defendant objected, and had his exception entered of record.

Again, when the case was called for trial in Thomas county, the defendant raised the question of the jurisdiction of the court, and objected to that court proceeding with the trial. Under paragraph 1965, Gen. St. 1889, of the act concerning District Courts, a judge *pro tem.* may be selected "when the judge is interested, or has been of counsel in the case or subject-matter thereof, or is related to either of the parties, or otherwise disqualified to sit." So, under the statute, a defendant may be tried before a judge *pro tem.*, where the district judge is dis-

qualified by interest or otherwise, or he may, with his consent, have the cause removed to a different district. In this case there was no express consent on the part of the defendant to have the cause removed from his district. The most that can be said is that he consented inferentially to such removal by calling the court's attention to section 173 of the Criminal Code. He did not expressly request that the cause be transferred to a different district under the provision of that section. On the other hand, he expressly objected to the transfer. If counsel for the defendant misled the court at first, in referring to section 173 of the Criminal Code, defendant is not concluded, because he objected to the order to transfer. Before the order of removal was entered of record, the court was fully informed that the defendant did not consent, but positively objected to having his cause sent to a different district. The constitutional guaranty, securing to an accused a trial within the county or district in which the offense is committed, ought not to be annulled upon a mere inference or implication. Therefore, upon the record, we can not say that the defendant consented to the removal of the cause to a different district, or that he waived his constitutional right to be tried in the district in which the offense is alleged to have been committed. Under the provisions of the constitution and the statute, the removal of the cause from Cheyenne county to Thomas county, against the objection of the defendant, was without authority of law. The cause is pending in Cheyenne county, and all proceedings, subsequent to the attempted removal from that county must be ignored. The case may proceed to trial in Cheyenne county, as if no removal had been attempted. The judgment will be reversed, and cause remanded for further proceedings in accordance with the views herein expressed. All the justices concurring.

NOTE.—*Change of venue usually depends upon the number of affidavits on one side or the other.*—Legislation should be adopted by the States, respectively, so that the change of venue, in criminal cases, might be secured without being compelled to resort to the unseemly spectacle of having all the good and true men of the county, who believe the defendant is a "horse-thief," and ought to be punished on general principles, make affidavits that defendant can procure a fair trial, and an equal number of similar citizens, who file sworn statements showing that defendant can not procure a fair trial. It should be left to the oath of the accused, and if not made when called to plead, he ought to be precluded from making the application afterward, so far as related to the prejudice of the people.

On a motion for a change of venue, defendant's attorney swore that the clerk of the court was active in the prosecution, and had stated that he believed defendant guilty, and that the prejudice of the people against his client justified him in saying that defendant could not have a fair trial in the county. It was also alleged that repeated threats had been made to lynch defendant. There was filed a paper, signed by twenty-five citizens of the county, stating that from repeated expressions of public indignation in the county, by the citizens thereof, they did not believe that defendant could have a fair trial in the county. *Held*, that a change of venue was properly denied. *Jackson et al. v. State*, 104 Ala. 1.

SPARF ET AL. V. UNITED STATES.

(156 U. S. 51.)

CONFESSIONS: *Evidence admissible as to one defendant—Province of court and jury as to the law.*

1. The mere fact that one is confined under charge of a capital offense, does not make his confession involuntary.
2. A general objection made on the joint trial of two persons for murder, by counsel representing both, to the confession of one, made after the homicide, and not in the presence of the other, as incompetent, is sufficient to entitle the latter to have it excluded as to him. Mr. Justice Brewer and Mr. Justice Brown, dissenting.
3. In criminal cases, as in civil cases, the determination of the law is for the court, and it may refuse to charge on degrees of homicide, of which there is no evidence, and may state that, under the evidence, there must be either acquittal or conviction of murder. Mr. Justice Gray and Mr. Justice Shiras dissenting.

In error to the Circuit Court of the United States for the Northern District of California.

Mr. J. F. Smith and *Mr. F. J. Kierce*, for plaintiffs in error.
Assistant Attorney-General Conrad, for defendants in error.

Mr. Justice HARLAN delivered the opinion of the court.

The plaintiffs in error and Thomas St. Clair were indicted jointly for the murder of Maurice Fitzgerald, upon the high seas, on board of an American vessel, the bark *Hesper*, as set forth in the indictment mentioned in *St. Clair v. U. S.*, 154 U. S. 134. On motion of the accused, it was ordered that they be tried separately. St. Clair was tried, found guilty of

murder, and sentenced to suffer the punishment of death. Subsequently, the order for separate trials was set aside, and the present defendants were tried together, and both were convicted of murder. A motion for a new trial having been overruled, a like sentence was imposed upon them.

The general facts of this case do not differ from those proved in St. Clair's case, and some of the questions arising upon the present assignments of error were determined in that case. Only such questions will be here examined as were not properly presented or did not arise in the other case, and as are of sufficient importance to require notice at our hands.

In the night of January 13, 1893, Fitzgerald, the second mate of the Hesper, was found to be missing, and it was believed that he had been killed, and his body thrown overboard. Suspicion being directed to St. Clair, Sparf and Hansen, part of the crew of the Hesper, as participants in the killing, they were put in irons, by order of Captain Sodergren, master of the vessel, and were so kept during the voyage from the locality of the supposed murder to Tahiti, an island in the South Pacific, belonging to the French government. They were taken ashore by the United States consul at that island, and subsequently were sent, with others, to San Francisco, on the vessel Tropic Bird.

At the trial, Captain Sodergren, a witness for the government, was asked whether or not, after the 13th day of January, and before reaching Tahiti, which was more than 1,000 miles from the locality of the alleged murder, he had any conversation with the defendant Hansen about the killing of Fitzgerald. This question having been answered by the witness in the affirmative, he was fully examined as to the circumstances under which the conversation was held. He said, among other things, that no one was present but Hansen and himself. Being asked to repeat the conversation referred to, the accused, by the counsel who had been appointed by the court to represent them, objected to the question as "irrelevant, immaterial, and incompetent, and upon the ground that any statement made by Hansen was not and could not be voluntary." The objection was overruled, and the defendants duly excepted. The witness then stated what Hansen had said to him. That evidence tended strongly to show that Fitzgerald was murdered, pursuant to a plan formed between St. Clair, Sparf and Han-

sen; that all three actively participated in the murder; and that the crime was committed under the most revolting circumstances.

Thomas Green and Edward Larsen, two of the crew of the *Hesper*, were also witnesses for the government. They were permitted to state what Hansen said to them during the voyage from Tahiti to San Francisco. This evidence was also objected to as irrelevant, immaterial, and incompetent, and upon the further ground that the statement, the accused was represented to have made, was not voluntary. But the objection was overruled, and an exception taken.

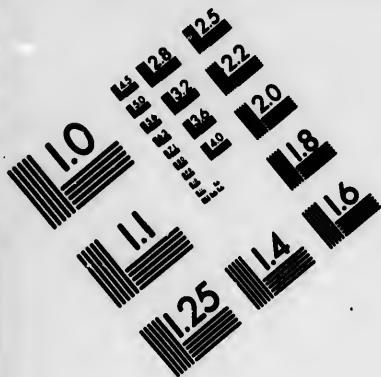
Upon the conclusion of the evidence, the defendants requested certain instructions, which the court refused to give, and they excepted to its action in that particular, as well as to certain parts of the charge to the jury.

1. The declarations of Hansen, as detailed by Sodergren, Green and Larsen, were clearly admissible in evidence against him. There was no ground on which their exclusion could have been sustained. In reference to this proof, the court charged the jury that if they believed from the evidence that Green and Larsen, or either of them, were accomplices in the commission of the acts charged in the indictment, they should act upon their testimony with great caution, subjecting it to a careful examination, in the light of all the other evidence, and ought not to convict upon their testimony alone, unless satisfied beyond reasonable doubt of its truth; that if Larsen and Green, or either of them, or any other person, were induced to testify by promises of immunity from punishment, or by hope held out from any one that it would go easier with them in case they disclosed their confederates, or in case they implicated some one else in the crime, this must be taken into consideration in determining the weight to be given to their testimony, and should be closely scrutinized; that the confessions of a prisoner out of court and in custody, made to persons having no authority to examine him, should be acted upon and received with great care and caution; that words are often misreported through ignorance, inattention, or malice, are extremely liable to misconstruction, are rarely sufficient to warrant conviction, as well on account of the great danger of mistake upon the part of the witness, as of the fact that the mind of the prisoner himself may be oppressed by his situation or

influenced by motives of hope or fear to make an untrue confession; that, in considering the weight to be given to the alleged confessions of the defendants, the jury were to consider their condition at the time they were made, the fact that they had been charged with crime, and were in custody, and that the jury were to determine whether those confessions were voluntary, or whether any inducements were held out to them by any one. The defendants did not offer themselves as witnesses, and the court took care to say that a person charged with crime is under no obligation to testify in his own behalf, and that his neglect to testify did not create any presumption whatever against him.

So far as the record discloses, these confessions were entirely free and voluntary, uninfluenced by any hope of reward or fear of punishment. In *Hopt v. Utah*, 110 U. S. 574, 584, it was said: "While some of the adjudged cases indicate distrust of confessions which are not judicial, it is certain, as observed by Baron Parke, in *Reg. v. Baldry*, 2 Dennison Cr. Cas. 430, 445, that the rule against their admissibility has been sometimes carried too far, and in its application, justice and common sense have too frequently been sacrificed at the shrine of mercy. A confession, if freely and voluntarily made, is evidence of the most satisfactory character. Such a confession, said Eyre, C. B. (*King v. Warickshall*, 1 Leach, Cr. 263), 'is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers.' Elementary writers of authority concur in saying that while, from the nature of such evidence, it must be subjected to careful scrutiny, and received with great caution, a deliberate voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession."

Counsel for the accused insist that there can not be a voluntary statement, a free open confession, while a defendant is confined and in irons, under an accusation of having committed a capital offense. We have not been referred to any authority in support of that position. It is true that the fact of a prisoner being in custody at the time he makes a confession is a circumstance not to be overlooked, because it bears upon the inquiry whether the confession was voluntarily made,



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or was extorted by threats or violence, or made under the influence of fear. But confinement or imprisonment is not, in itself, sufficient to justify the exclusion of a confession, if it appears to have been voluntary and was not obtained by putting the prisoner in fear or by promises. Whart. Cr. Ev. (9th Ed.), §§ 661, 663, and authorities cited. The import of Sodergren's evidence was that, when Hansen manifested a desire to speak to him on the subject of the killing, the latter said he did not wish to hear it but "to keep it until the right time came, and then tell the truth." But this was not offering to the prisoner an inducement to make a confession. Littledale, J., well observed, in *Rex v. Court*, 7 Car. & P. 486, that telling a man to be sure to tell the truth is not advising him to confess anything of which he is really not guilty. See, also, *Queen v. Reeves*, L. R. 1 Cr. Cas. 362. Nothing said to Hansen prior to the confession was at all calculated to put him in fear, or to excite any hope of his escaping punishment by telling what he knew or witnessed or did in reference to the killing.

The declarations of Hansen, after the killing, as detailed by Green and Larson, were also admissible in evidence against Sparf, because they appear to have been made in his presence, and under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth.

But the confession and declarations of Hansen to Sodergren after the killing of Fitzgerald were incompetent as evidence against Sparf. St. Clair, Hansen, and Sparf were charged jointly with the murder of Fitzgerald. What Hansen said after the deed had been fully consummated, and not on the occasion of the killing, and in the presence only of the witness, was clearly incompetent against his co-defendant, Sparf, however strongly it tended to connect the latter with the commission of the crime. If the evidence made a case of conspiracy to kill and murder, the rule is settled that "after the conspiracy has come to an end, and whether by success or by failure, the admissions of one conspirator, by way of narrative of past facts, are not admissible in evidence against the others." *Logan v. U. S.*, 144 U. S. 263, 309; *Brown v. U. S.*, 150 U. S. 93, 98; Wright's Cr. Consp. (Carson's Ed.), 212, 213, 217; 1 Greenl. Ev., § 233. The same rule is applicable where the evidence does

not show that the killing was pursuant to a conspiracy, but yet was by the joint act of the defendants.

The objection to the question in answer to which the declarations of Hansen to Sodergren were given, was sufficiently specific. The general rule undoubtedly is that an objection should be so framed as to indicate the precise point upon which the court is asked to rule. It has, therefore, been often held that an objection to evidence as irrelevant, immaterial, and incompetent, nothing more being stated, is too general to be considered on error, if, in any possible circumstances it could be deemed or could be made relevant, material, or competent. But this principle will not sustain the ruling by which the declarations of Hansen, made long after the commission of the alleged murder, and not in the presence of Sparf, were admitted as evidence against the latter. In no state of case were those declarations competent against Sparf. Their inadmissibility as to him was apparent. It appeared upon the very face of the question itself.

In *People v. Beach*, 87 N. Y. 508, 513, which was an indictment for petit larceny, the prosecution offered in evidence the statements of a third party, not in the presence of the accused, which related to the vital point upon which the conviction turned. There was a general objection to the evidence. The court said: "We think, however, the general objection made in this case was sufficient. It appeared when the objection was made, that the conversation proposed to be shown was between the prosecutor and Hardacre, when the defendant was not present. There was no possible view of the case, as it then or afterward stood, in which such a conversation was admissible. When the witness was asked to state the conversation, and counsel objected, both the court and the prosecuting officer must have understood that it was an objection to the competency of the proposed evidence. If the objection had been made in terms, on the ground that the evidence was incompetent, the sufficiency of the objection could not have been questioned, and the objection, as made, necessarily implied this. Neither the court nor prosecuting attorney could have been misled as to the point of the objection; it was patent on considering the objection in connection with the proof offered. If any doubt could be entertained as to the technical sufficiency of the objection, we should be disinclined, in

a criminal case, to deprive a defendant of the benefit of an exception by the strict application of a rule more especially applicable to civil cases, when we can see that its application would produce injustice." And in *Turner v. City of Newburgh*, 109 N. Y. 301, 308, it was said: "This court has held that when the objection to evidence is general, and it is overruled, and the evidence is received, the ruling will not be held erroneous, unless there be some grounds which could not have been obviated had they been specified, or unless the evidence in its essential nature be incompetent." *Tozer v. Railroad Co.*, 105 N. Y. 659; *Alcorn v. Railroad Co.*, 108 Mo. 81; *Curr v. Hundley* (Colo. App.), 31 Pac. 939, 940; *Lowenstein v. McCadden*, 92 Tenn. 614; *Ward v. Wilms*, 16 Colo. 86.

We are of opinion that as the declarations of Hansen to Sodergren were not, in any view of the case, competent evidence against Sparf, the court, upon objection being made by counsel representing both defendants, should have excluded them as evidence against him, and admitted them against Hansen. The fact that the objection was made in the name of both defendants, did not justify the court in overruling it as to both, when the evidence was obviously incompetent, and could not have been made competent against Sparf, and was obviously competent against Hansen.

It was not necessary that counsel should have made the objection on behalf of one defendant, and then formally repeated it, in the same words, for the other defendant. If Sparf had been tried alone, a general objection in his behalf, on the ground of incompetency, would have been sufficiently definite. Surely such an objection coming from Sparf when tried with another ought not to be deemed ineffectual because of the circumstance that his counsel, who, by order of the court represented also his co-defendant, incautiously spoke in the name of both defendants. Each was entitled to make his own defense, and the jury could have found one of them guilty, and acquitted the other. *Insurance Co. v. Hillmon*, 145 U. S. 285, 293. See, also, *Com. v. Robinson*, 1 Gray, 555, 560.

For the error of the court in not sustaining the objection referred to, so far as it related to Sparf, the judgment must be reversed as to him. If he were the only defendant, we might withhold any expression of opinion upon other questions raised by the assignments of error. But as some of those

questions are important, and may arise upon another trial of Sparf, and especially as they must be now determined with reference to Hansen, we proceed to their examination.

2. One of the specifications of error relates to the refusal of the court to give certain instructions asked by the defendants, and to parts of the charge to the jury.

The defendants asked the court to instruct the jury as follows:

"In all criminal causes the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or the defendant may be found guilty of an attempt to commit the offense so charged, provided that such attempt be itself a separate offense." "Under an indictment charging murder, the defendant may be convicted of murder, or manslaughter, or an attempt to commit either murder or manslaughter." "Under the indictment in this case, the defendants may be convicted of murder or manslaughter, or of an attempt to commit murder or manslaughter; and if, after a full and careful consideration of all the evidence before you, you believe, beyond a reasonable doubt, that the defendants are guilty, either of manslaughter or of an assault with intent to commit murder or manslaughter, you should so find your verdict." These instructions were refused, and the defendants excepted.

In its charge to the jury, the court, among other things, said:

"What, then, is murder? There are only two kinds of felonious homicide known to the laws of the United States. One is murder, and the other is manslaughter. There are no degrees of murder." "There is no definition of 'murder' by any United States statute. We resort to the common law for that. By the common law, murder is the unlawful killing of a human being in the peace of the State, with malice aforethought, either express or implied. Malice, then, is an element in the offense, and discriminates it from the other crime of felonious homicide which I have mentioned, to wit, manslaughter; that is, malice, express or implied, discriminates murder from the offense of manslaughter." "Express malice exists when one, by deliberate premeditation and design, formed in advance, to kill or to do bodily harm, the premeditation and design being implied from external circumstances

capable of proof, such as lying in wait, antecedent threats, and concerted schemes against a victim. Implied malice is an inference of the law from any deliberate and cruel act committed by one person against another. The two kinds of malice, therefore, to repeat, indicate but one state of mind, established in different ways—the one by circumstances showing premeditation of the homicide, the other by an inference of the law from the act committed; that is, malice is inferred when one kills another without provocation, or when the provocation is not great. Manslaughter is the unlawful killing of a human being without malice, either expressed or implied. I do not consider it necessary, gentlemen, to explain it further, for if a felonious homicide has been committed, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder. In other words, it may be in the power of the jury, under the indictment by which these defendants are accused and tried, of finding them guilty of a less crime than murder, to wit, manslaughter, or an attempt to commit murder; yet, as I have said in this case, if a felonious homicide has been committed at all, of which I repeat you are the judges, there is nothing to reduce it below the grade of murder."

The court further said to the jury:

"You are the exclusive judges of the credibility of the witnesses, and, in judging of their credibility, you have a right to take into consideration their prejudices, motives, or feelings of revenge, if any such have been proven or shown by the evidence in the case. If you believe from the evidence that any witness or witnesses have knowingly and wilfully testified falsely as to any material fact or point, you are at liberty to disregard entirely the testimony of such witness or witnesses." "Gentlemen, I have given you these instructions as carefully as I could, avoiding all references to the testimony; but I do not wish to be misunderstood, and out of abundant caution I say further to you, in giving you these instructions, I may by accident have assumed facts to be proven. If so, you must disregard the assumption. It is not my purpose, nor is it my function, to assume any fact to be proven, nor to suggest to you that any fact has been proven. You are the exclusive judges of the fact. No matter what assumption may appear during the course of the trial in any ruling of mine, or what

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may appear in any one of these instructions, you are to take this case and consider it, and remember you are the tribunal to which the law has referred the case, and whose judgment the law wants on the case."

After the jury had been in consultation for a time, they returned into court for further instructions. The colloquy between the court and the jurors is set forth at large in the margin.¹

¹Foreman: There is one of us who wishes to be instructed by your honor as to certain points upon the question of United States marine laws in regard to murder on the high seas.

Court: The instruction which I gave you, gentlemen, in regard to the law upon which the indictment was based, was section 5339 of the Revised Statutes, which I will read to you again.

Juror: Your honor, I would like to know in regard to the interpretation of the laws of the United States in regard to manslaughter, as to whether the defendants can be found guilty of manslaughter, or that the defendants must be found guilty.

Court: I will read the section to you, and see if that touches the proposition. The indictment is based upon section 5339, which provides, among other things, "that every" person who commits murder upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, or who, upon any such waters, maliciously strikes, stabs, wounds, poisons, "or shoots any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies on land or at sea, within or without the United States, shall suffer death." Hence, that is the penalty for the offense described in the indictment. I have given you the definition of "murder." If you remember it, you will connect it with these words: "Every person who commits murder upon the high seas, or in any arm of the sea, or in any river, haven," etc.

Juror: Are the two words "aiding" or "abetting" defined?

Court: The words "aiding" or "abetting" are not defined, but I have instructed you as to the legal effect of aiding and abetting, and this you should accept as law. If I have made an error, there is a higher tribunal to correct it.

Juror: I am the spokesman for two of us. We desire to clearly understand the matter. It is a barrier in our mind to our determining the matter. The question arising amongst us is to aiding and abetting. Furthermore, as I understand, it must be one thing or the other. It must be guilty or not guilty.

Court: Yes, under the instructions I have given you. I will read them to you again, so as to be careful, and that you may understand. Murder is the unlawful killing of a human being in the peace of the State, with malice aforethought, either express or implied. I defined to you what malice was, and I assume you can recall my definition to your minds. Manslaughter is the unlawful killing of a human being without malice,

The requests for instruction made by the defendants were based upon section 1035 of the Revised Statutes of the United States, providing that "in all criminal causes the defendant may be found guilty of any offense, the commission of which

either express or implied. I do not consider it necessary to explain it further. If a felonious homicide has been committed by either of the defendants, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder.

Juror: Then, as I understand your honor clearly, there is nothing about manslaughter in this case?

Court: No; I do not wish to be so understood. A verdict must be based on evidence, and in a proper case a verdict for manslaughter may be rendered.

Juror: A crime committed on the high seas must have been murder, or can it be manslaughter?

Court: In a proper case, it may be murder, or it may be manslaughter; but in this case it can not be properly manslaughter. As I have said, if a felonious homicide has been committed, the facts of the case do not reduce it below murder. Do not understand me to say that manslaughter or murder has been committed. That is for you gentlemen to determine, from the testimony and the instructions I have given you. * * *

Mr. Smith: We take an exception.

Juror: We have got to bring a verdict for either manslaughter or murder?

Court: Do not misunderstand me. I have not said so.

Juror: I know you have not.

Court: I can not direct you what conclusion to come to from the facts. I direct you only as to the law. A judgment on the facts is your province.

Mr. Garter: May I ask the court to instruct this jury, that in cases where persons are being tried upon a charge of murder, and the facts proven at their trial show that the defendants are guilty of manslaughter, under an indictment, they may find him guilty of manslaughter, as a general rule; but, however, if the facts show that the defendants have been guilty of murder, and that, in this case, there is no evidence tending to establish the crime or offense of manslaughter—

Mr. Smith: It is the province of the jury.

Court: I have already so instructed the jury. I have endeavored to make myself understood.

Juror: If we bring in a verdict of guilty, that is capital punishment?

Court: Yes.

Juror: Then there is no other verdict we can bring in except guilty or not guilty?

Court: In a proper case, a verdict for manslaughter may be rendered, as the district attorney has stated, and even in this case you have the physical power to do so; but, as one of the tribunals of the country, a jury is expected to be governed by law, and the law it should receive from the court.

Juror: There has been a misunderstanding amongst us. Now it is clearly interpreted to us, and no doubt we can now agree on certain facts.

is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged; provided, that such attempt be itself a separate offense."

The refusal to grant the defendants' requests for instructions, taken in connection with so much of the charge as referred to the crime of manslaughter, and the observations of the court when the jury, through their foreman, applied for further instructions, present the question whether the court transcended its authority when saying, as in effect it did, that, in view of the evidence, the only verdict the jury could, under the law, properly render, would be either one of guilty of the offense charged, or one of not guilty of the offense charged; that if a felonious homicide had been committed by either of the defendants, of which the jury were the judges from the proof, there was nothing in this case to reduce it below the grade of murder; and that, "as one of the tribunals of the country, a jury is expected to be governed by law, and the law it should receive from the court."

The court below assumed, and correctly, that section 1035 of the Revised Statutes did not authorize a jury in a criminal case to find the defendant guilty of a less offense than the one charged, unless the evidence justified them in so doing. Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and the principles of law applicable to the case on trial. The only object of that section was to enable the jury, in case the defendant was not shown to be guilty of the particular crime charged, and if the evidence permitted them to do so, to find him guilty of a lesser offense necessarily included in the one charged, or of the offense of attempting to commit the one charged. Upon a careful scrutiny of the evidence, we can not find any ground whatever upon which the jury could properly have reached the conclusion that the defendant Hansen was only guilty of an offense included in the one charged, or of a mere attempt to commit the offense charged. A verdict of guilty of an offense less than the one charged would have been in flagrant disregard of all the proof, and in violation by the jury of their obligation to render a true verdict. There was an entire absence of evidence upon which to rest a verdict of guilty of manslaughter or of simple assault. A verdict of that kind

would have been the exercise by the jury of the power to commute the punishment for an offense actually committed, and thus impose a punishment different from that prescribed by law.

The general question as to the duty of the jury to receive the law from the court is not concluded by any direct decision of this court. But it has been often considered by other courts and by judges of high authority; and, where its determination has not been controlled by specific constitutional or statutory provisions expressly empowering the jury to determine both law and facts, the principle by which courts and juries are to be guided in the exercise of their respective functions has become firmly established. If this be true, this court should not announce a different rule, unless impelled to do so by reasons so cogent and controlling that they can not properly be overlooked or disregarded. Some of the members of this court, after much consideration, and upon an extended review of the authorities, are of opinion that the conclusion reached by this court is erroneous, both upon principle and authority. For this reason, and because the question is of great importance in the administration of justice, and also involves human life, we deem it appropriate to state with more fullness than under other circumstances would be necessary, the grounds upon which our judgment will rest, looking first to cases determined in the courts of the United States.

In *Georgia v. Brailsford*, 3 Dall. 1, 4, a case in this court, tried by a special jury upon an amicable issue, Chief Justice Jay is reported to have said: "It may not be amiss here, gentlemen, to remind you of the good old rule, that on questions of fact it is the province of the jury, on questions of law it is the province of the court, to decide. But it must be observed that, by the same law which recognizes this reasonable distribution of jurisdiction, you have, nevertheless, a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt you will pay that respect which is due to the opinion of the court; for, as on the one hand, it is presumed that juries are best judges of facts, it is, on the other hand, presumable that the courts are the best judges of the law. But, still, both objects are lawfully within your power of decision." Of the correctness of this report,

Mr. Justice Curtis, in *U. S. v. Morris*, 1 Curt. 23, 58, Fed. Cas. No. 15,815, expressed much doubt, for the reason that the chief justice is reported as saying that, in civil cases—and that was a civil case—the jury had the right to decide the law, and because, also, the different parts of the charge conflict with each other; the chief justice, according to the report, saying, at the outset, that it is the province of the jury to decide questions of fact, and of the court to decide questions of law, and, in the succeeding sentence, informing the jury that they had the right to take upon themselves the determination of both law and fact. If the chief justice said that it was the province of the court to decide questions of law, and the province of the jury to decide questions of fact, he could not have said that the jury had the right, in a civil case, to judge of and determine both law and fact. “The whole case,” Mr. Justice Curtis said, “is an anomaly. It purports to be a trial by jury, in the Supreme Court of the United States, of certain issues out of chancery; and the chief justice begins by telling the jury that the facts are all agreed, and the only question is a matter of law, and upon that the whole court were agreed. If it be correctly reported, I can only say it is not in accordance with the views of any other court, so far as I know, in this country or in England, and is certainly not in accordance with the course of the Supreme Court for many years.”

Certain observations of Chief Justice Marshall in the course of the trial of Burr, have sometimes been referred to in support of the contention that the jury in a criminal case are under no legal obligation to accept the law as laid down by the court. But nothing said by him at that trial was inconsistent with the views expressed by eminent jurists in cases to be presently cited. In the course of an opinion, relating merely to the order of evidence, the Chief Justice said: “Levying of war is a fact which must be decided by the jury. The court may give general instructions on this as on every other question brought before them, but the jury must decide upon it as compounded of fact and law.” 1 Burr’s Trial, 470. This language is supposed to justify the contention that the jury in a criminal case are entitled, of right, to determine questions of pure law adversely to the direction of the court. But that no such thought was in the mind of the Chief Justice is

manifest from his written charge to the jury at a subsequent stage of the trial—the accuracy of the report of which has never been disputed—in which he discussed, in the light of the authorities, the question as to what constituted treason.

In the course of that charge he indicated quite distinctly his view of the respective functions of court and jury. "It has been thought proper," he said, "to discuss this question at large, and to review the opinion of the Supreme Court (*Ex parte Bollman*, 4 Cranch, 75), although this court would be more disposed to leave the question of fact, whether an overt act of levying war was committed on Blennerhassett's island, to the jury under this explanation of the law, and to instruct them that, unless the assemblage on Blennerhassett's island was an assemblage in force—was a military assemblage in a condition to make war—it was not levying war, and that they could not construe it into an act of war, than to arrest the further testimony which might be offered to connect the prisoner with that assemblage, or to prove the intention of those who assembled together at that place. This point, however, is not to be understood as decided. It will, perhaps, constitute an essential inquiry in another case." This language is wholly inconsistent with the theory that the Chief Justice recognized the right of the jury to disregard the court's view of the law upon any question arising in the case before them. It was consistent only with the theory that the court could speak authoritatively as to the law, while the function of the jury was to respond as to the facts. Again: "It is the further opinion of the court that there is no testimony whatever, which tends to prove that the accused was actually or constructively present when that assemblage did take place; indeed, the contrary is most apparent." "The opinion of this court on the order of testimony has frequently been adverted to as deciding this question against the motion. If a contradiction between the two opinions exist, the court can not perceive it. It was said that levying war is an act compounded of law and fact, of which the jury, aided by the court, must judge. To that declaration the court still adheres." He concluded his memorable charge in these words: "The jury have now heard the opinion of the court on the law of the case. They will apply that law to the facts, and will find a verdict of guilty or not guilty, as their own consciences may direct." Again, according to the

only recognized report of that trial ever published, the Chief Justice, in response to certain inquiries of counsel, made after the jury returned their verdict, said: "Without doubt the court intended to deliver merely a legal opinion as to what acts amounted, in law, to an overt act of levying war, and not whether such an overt act has or has not been proved. It merely stated the law to which the jury would apply the facts proved. It is their province to say whether, according to this statement and the evidence, an overt act has been proved or not." 2 Burr's Trial, 401, 422, 439, 444, 445, 448. The language of the Chief Justice plainly imports that, while the jury must, of necessity, often pass upon a question "compounded of fact and law," their duty, when considering the evidence, was to apply the law, as given by the court, to the facts proved; and, thus applying the law, return a verdict of guilty or not guilty, as their consciences might direct. If he had believed that the jury were entitled, of right, whatever might be the views of the court, to determine for themselves the law of the case, it is impossible that he could have said that "they will apply that law (the law as he declared it to be) to the facts." On the contrary, he observed that the province of the jury was to determine whether the accused was guilty or not guilty, according to his statement of the law as applied to the evidence.

Of course, this court has no means of determining what were the views of Chief Justice Marshall, except by referring to such authorized publications as show what he said while discharging judicial functions. In none of his opinions delivered at the Circuit Court, and published, can there be found anything at all in conflict with his declarations at the trial of Burr. And it may be observed that the circumstances attending that trial were such as to induce him to weigh every word embodied in his elaborate written charge to the jury. That he understood the gravity of the occasion, so far as it related to the conduct of the trial, is manifest from his referring, in the following language, to certain considerations that had been advanced in argument: "That this court dare not usurp power, is most true. That this court dare not shrink from its duty, is not less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it

to the bottom. But if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the "world," he merits the contempt as well as the indignation of his country who can hesitate which to embrace. That gentlemen, in a case the most interesting, in the zeal with which they advocate particular opinions, and under the conviction in some measure produced by that zeal, should, on each side, press their arguments too far, should be impatient at any deliberation in the court, and should suspect or fear the operation of motives to which alone they can ascribe that deliberation, is perhaps a frailty incident to human nature; but, if any conduct on the part of the court could warrant a sentiment that it would deviate to the one side or the other from the line prescribed by duty and by law, that conduct would be viewed, by the judges themselves, with an eye of extreme severity, and would long be recollected with deep and serious regret."

In *Henfield's case*, Fed. Cas. No. 6,360, Mr. Justice Wilson, with whom sat Mr. Justice Iredell, stated that the jury, in a general verdict, must decide both law and fact, but that "this did not authorize them to decide it as they pleased," and that, "the questions of law coming into joint consideration with the facts, it is the duty of the court to explain the law to the jury, and give it to them in direction." *Whart. St. Tr.* 48, 84, 88. This statement of the principle is sometimes referred to in support of the proposition that the jury is not under a legal duty to accept the law as declared by the court in a criminal case. We think it tends to show that it is the province and duty of the jury to apply to the facts of the case the law as given to them by the court "in direction."

There is nothing in conflict with this in the lectures on law delivered by Mr. Justice Wilson. In one of those lectures, referring to the duties of jurors in criminal cases, he said: "On questions of law, his (the juror's) deficiencies will be supplied by the professional directions of the judges, whose duty and whose business it is professionally to direct him; for, as we have seen, verdicts, in criminal cases, generally determine the question of law as well as the question of fact. Questions of fact it is his exclusive province to determine. With the consideration of evidence unconnected with the question which he is to try, his attention will not be distracted; for every thing

of that nature, we presume, will be excluded by the court. The collected powers of his mind, therefore, will be fixed, steadily and without interruption, upon the issue he is sworn to try. This issue is an issue of fact." 2 Wilson's Works, 386. Other observations found in these lectures, if considered alone, are not so explicit upon the question of the respective functions of court and jury, but, taken in connection with all that he said, it is reasonably clear that when Mr. Justice Wilson spoke of the determination by a jury, in a criminal case, of both law and fact, he meant only that a general verdict of guilty or not guilty, of necessity, decided every question before them which involved a joint consideration of law and fact, not that the jury could ignore the directions of the court, and take the law into their own hands.

The observations of Mr. Justice Samuel Chase, in the case of Fries, Fed. Cas. No. 5,126, tried for treason, 1800, are supposed to sustain the broad proposition that the jury may, of right, disregard the law as expounded by the court. He undoubtedly did say that while it was the duty of the court, in all criminal cases, to state the law arising on the facts, the jury were to decide "both the law and facts, on their consideration of the whole case." Chase, Trial, Append. 45. But on the trial, in the same year, in the Circuit Court of the United States for the Virginia District, of James Thompson Callender for seditious libel, he was appalled at the suggestion by learned counsel that the jury were entitled, of right, to determine the constitutional validity of the act of Congress under which the accused was indicted. Mr. Wirt, counsel for the defendant, said: "Since, then, the jury have a right to consider the law, and since the constitution is law, the conclusion is certainly syllogistic that the jury have a right to consider the constitution." But Mr. Justice Chase declined to accept this view. He said: "The statute on which the traverser is indicted enacts 'that the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases.' By this provision I understand that a right is given to the jury to determine what the law is in the case before them, and not to decide whether a statute of the United States produced to them is a law or not, or whether it is void, under an opinion that it is unconstitutional; that is, contrary to the constitution of the

United States. I admit that the jury are to compare the statute with the facts proved, and then to decide whether the acts done are prohibited by the law, and whether they amount to the offense described in the indictment. This power the jury necessarily possesses, in order to enable them to decide on the guilt or innocence of the person accused. It is one thing to decide what the law is on the facts proved, and another and a very different thing to determine that the statute produced is no law. To decide what the law is on the facts is an admission that the law exists. If there be no law in the case, there can be no comparison between it and the facts; and it is unnecessary to establish facts before it is ascertained that there is a law to punish the commission of them."

"It was never pretended," he continued, "as I ever heard, before this time, that a petit jury in England (from whence our common law is derived), or in any part of the United States, ever exercised such power. If a petit jury can rightfully exercise this power over one statute of Congress, they must have an equal right and power over any other statute, and indeed over all the statutes; for no line can be drawn, no restriction imposed, on the exercise of such power; it must rest in discretion only. If this power be once admitted, petit jurors will be superior to the National Legislature, and its laws will be subject to their control. The power to abrogate or to make laws nugatory is equal to the authority of making them. The evident consequences of this right in juries will be that a law of Congress will be in operation in one State, and not in another.

"A law to impose taxes will be obeyed in one State, and not in another, unless force be employed to compel submission. The doing of certain acts will be held criminal, and punished in one State, and similar acts may be held innocent, and even approved and applauded in another. The effects of the exercise of this power by petit jurors may be readily conceived. It appears to me that the right now claimed has a direct tendency to dissolve the Union of the United States, on which, under divine Providence, our political safety, happiness and prosperity depend." He concluded his opinion in these words: "I consider it of the greatest consequence to the administration of justice that the powers of the court and the powers of the petit jury should be kept distinct and separate. I have

uniformly delivered the opinion 'that the petit jury have a right to decide the law as well as the fact in criminal cases;' but it never entered into my mind that they therefore had a right to determine the constitutionality of any statute of the United States." Whart. St. Tr. 713, 714, 718.

What Mr. Justice Chase said is quite sufficient to show the mischievous consequences that would flow from the doctrine that the jury may, of right, disregard the directions of the court, and determine the law for themselves; for if, as is contended, the jury in criminal cases are not bound to take the law from the court, it is impossible to deny their absolute right in a case depending entirely upon an act of Congress, or a statute of a State, to determine, upon their own responsibility, whether that act or statute is or is not law; that is, whether it is or is not in violation of the constitution.

Mr. Justice Thompson, who became a member of this court in 1823, concurred in the opinion delivered by Kent, J., in *People v. Crosswell* (1804), 3 Johns. Cas. 337, 362, where the court was equally divided, Chief Justice Lewis and Judge Brockholst Livingston, afterward a justice of this court, holding that to questions of law the court, to questions of fact the jury, must respond. But in his opinion in *Pierce v. State*, 13 N. H. 536, 564, Chief Justice Parker, referring to Judge Kent's opinion in *People v. Crosswell*, said: "Mr. Justice Thompson, who concurred in that opinion, must have understood that concurrence to be merely in the points necessary to the decision of that cause, or have subsequently changed his views; for I have his authority for saying that he has repeatedly ruled that the jury are not judges of the law in criminal cases." And in the dissenting opinion of Judge Bennett, in *State v. Croteau*, 23 Vt. 14, 63 (where it was held that the jury, in criminal cases, could rightfully decide questions of both law and fact, but which case has been overruled, 65 Vt. 1, 34), it was said: "Judge Thompson, whose judicial learning and experience, while on the bench of the Supreme Court of New York, and on the bench of the United States, were very extensive, thus wrote to a friend some short time before his death: 'I have repeatedly ruled on the trial of criminal cases that it was the right as well as the duty of the court to decide questions of law; and any other rule, it appears to me, would be at war with our whole judicial system, and introduce the utmost con-

fusion in criminal trials. It is true, the jury may disregard the instructions of the court, and in some cases there may be no remedy. But it is still the right of the court to instruct the jury on the law, and the duty of the jury to obey the instructions.'” See, also, Whart. Cr. Pl., § 810, note 3.

The remarks of Mr. Justice Baldwin in *U. S. v. Wilson and Porter*, 1 Baldw. 78, 100, 108, Fed. Cas. No. 16,730, have sometimes been referred to as in conflict with the rule that it is the duty of the jury to accept the law as expounded by the court. It is quite true that, in the charge in Wilson's case, Mr. Justice Baldwin said that if the jury were prepared to say that the law was different from what the court had announced, they were in the exercise of their constitutional right to do so. But in his charge in Porter's case he explained what was said in Wilson's case. After remarking that, if a jury find a prisoner guilty against the court's opinion of the law of the case, a new trial would be granted, as no court would pronounce a judgment on a prisoner against what it believes to be the law, he said: “This, then, you will understand to be what is meant by your power to decide on the law; but you will still bear in mind that it is a very old, sound and valuable maxim that the court answers to questions of law, and the jury to facts. Every day's experience evinces the wisdom of this rule.” Subsequently, in *U. S. v. Shive*, 1 Baldw. 510, 513, Fed. Cas. No. 16,278, which was an indictment for passing a counterfeit note of the Bank of the United States, and when the question arose as to the right of the jury to pass upon the constitutionality of the act of Congress on which the prosecution was founded, Mr. Justice Baldwin said, in his charge: “If juries once exercise this power we are without a Constitution or laws; one jury has the same power as another; you can not bind those who may take your places; what you declare constitutional to-day another jury may declare unconstitutional to-morrow.”

The question before us received full consideration by Mr. Justice Story, in *U. S. v. Battiste*, 2 Sumn. 240, 243, 244, Fed. Cas. No. 14,545. That was an indictment for a capital offense, and the question was directly presented whether in criminal cases, especially in capital cases, the jury were the judges of the law as well as of the facts. He said:

“My opinion is that the jury are no more judges of the law

in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact, and includes both. In each they must necessarily determine the law as well as the fact. In each they have the physical power to disregard the law, as laid down to them by the court. But I deny that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law, and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen, and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it, but in case of error there would be no remedy or redress by the injured party; for the court would not have any right to review the law as it had been settled by the jury." "Every person accused as a criminal has a right to be tried according to the law of the land—the fixed law of the land, and not by the law, as a jury may understand it, or choose, from wantonness or ignorance, or accidental mistake, to interpret it. If I thought that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But, believing, as I do, that every citizen has a right to be tried by the law, and according to the law—that it is his privilege and truest shield against oppression and wrong, I feel it my duty to state my views fully and openly on the present occasion."

In *U. S. v. Morris*, 1 Curt. 23, 51-58, Fed. Cas. No. 15,815, the question, in all of its aspects, was examined by Mr. Justice Curtis with his accustomed care. In that case the contention was that every jury, impaneled in a court of the United States, was the rightful judge of the existence, construction, and effect of every law that was material in a criminal case, and could, of right, and if it did its duty must, decide finally on the constitutional validity of any act of Congress which the

trial brought in question. Touching the rightful powers and duties of the court and the jury under the constitution in criminal cases, Mr. Justice Curtis, among other things, said: "The sixth article, after declaring that the constitution, laws and treaties of the United States shall be the supreme law of the land, proceeds, 'And the judges in every State shall be bound thereby.'

"But was it not intended that the constitution, laws and treaties of the United States should be the supreme law in criminal as well as in civil cases? If a State law should make it penal for an officer of the United States to do what an act of Congress commands him to do, was not the latter to be supreme over the former? And if so, and in such cases juries finally and rightfully determine the law, and the constitution so means, when it speaks of a trial by jury, why was this command laid on the judges alone, who are thus mere advisers of the jury, and may be bound to give sound advice, but have no real power in the matter? It was evidently the intention of the Constitution that all persons engaged in making, expounding and executing the laws, not only under the authority of the United States, but of the several States, should be bound by oath or affirmation to support the constitution of the United States. But no such oath or affirmation is required of jurors, to whom it is alleged the constitution confides the power of expounding that instrument, and not only construing, but holding invalid, any law which may come in question on a criminal trial." "In my opinion," the learned justice proceeded, "it is the duty of the court to decide every question of law which arises in a criminal trial. If the question touches any matter affecting the course of the trial, such as the competency of a witness, the admissibility of evidence, and the like, the jury receive no direction concerning it. It affects the materials out of which they are to form their verdict, but they have no more concern with it than they would have had if the question had arisen in some other trial. If the question of law enters into the issue, and forms part of it, the jury are to be told what the law is, and they are bound to consider that they are told truly; that law they apply to the facts as they find them, and thus, passing both on the law and the fact, they, from both, frame their general verdict of guilty or not guilty. Such is my view of the respective duties of the

different parts of this tribunal in the trial of criminal cases, and I have not found a single decision of any court in England, prior to the formation of the constitution, which conflicts with it."

It was also contended that the clause in the act of Congress known as the Sedition Law of 1798 (1 Stat. c. 74, § 3), declaring that "the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases," implied that the jury, "in other cases" might decide the law contrary to the direction of the court. But in response to this view Mr. Justice Curtis said: "I draw from this the opposite inference, for where was the necessity of this provision, if, by force of the constitution, juries, as such, have both the power and the right to determine all questions in criminal cases; and why are they to be directed by the court?" See, also, *Montgomery v. State*, 11 Ohio, 427.

But Mr. Justice Curtis considered the question from another point of view, and gave reasons which appear to us entirely conclusive against the proposition that it is for the jury, in every criminal case, to say authoritatively what is the law by which they are to be governed in finding their verdict. He said: "There is, however, another act of Congress which bears directly on this question. The act of the 29th of April, 1802, in section 6, after enacting that, in case of a division of opinion between the judges of the Circuit Court on any question, such question may be certified to the Supreme Court, proceeds: 'and shall by the said court be finally decided; and the decision of the Supreme Court and their order in the premises shall be remitted to the Circuit Court, and be there entered of record and have effect according to the nature of such judgment and order.' The residue of this section proves that criminal as well as civil cases are embraced in it, and under it many questions arising in criminal cases have been certified to and decided by the Supreme Court, and persons have been executed by reason of such decisions. Now, can it be, after a question arising in a criminal trial has been certified to the Supreme Court, and there, in the language of this act, finally decided, and their order remitted here and entered of record, that when the trial comes on the jury may rightfully revise and reverse this final decision? Suppose, in the course of this

trial, the judges had divided in opinion upon the question of the constitutionality of the act of 1850, and that, after a final decision thereon by the Supreme Court and the receipt of its mandate here, the trial should come on before a jury, does the Constitution of the United States, which established that Supreme Court, intend that a jury may, as matter of right, revise and reverse that decision? And, if not, what becomes of this supposed right? Are the decisions of the Supreme Court binding on juries, and not the decisions of inferior courts? This will hardly be pretended; and if it were, how is it to be determined whether the Supreme Court has or has not, in some former case, in effect, settled a particular question of law? In my judgment, this act of Congress is in accordance with the constitution, and designed to effect one of its important and even necessary objects—a uniform exposition and interpretation of the law of the United States—by providing means for a final decision of any question of law—final as respects every tribunal and every part of any tribunal in the country; and, if so, it is not only wholly inconsistent with the alleged power of juries, to the extent of all questions so decided, but it tends strongly to prove that no such right as is claimed does or can exist."

Again: "Considering the intense interest excited, the talent and learning employed, and consequently the careful researches made, in England, near the close of the last century, when the law of libel was under discussion in the courts and in Parliament, it can not be doubted that, if any decision, having the least weight, could have been produced in support of the general proposition that juries are judges of the law in criminal cases, it would then have been brought forward. I am not aware that any such was produced. And the decision of the King's Bench in *Rex v. Dean of St. Asaph*, 3 Term R. 428, note, and the answers of the twelve judges to the questions propounded by the House of Lords, assume, as a necessary postulate, what Lord Mansfield so clearly declares in terms, that, by the law of England, juries can not rightfully decide a question of law. Passing over what was said by ardent partisans and eloquent counsel, it will be found that the great contest concerning what is known as 'Mr. Fox's Libel Bill' was carried on upon quite a different ground by its leading friends—a ground which, while it admits that the jury are not to decide the law,

denies that the libelous intent is matter of law, and asserts that it is so mixed with the fact that, under the general issue, it is for the jury to find it as a fact. 34 An. Reg. 170; 29 Parl. Deb. Such I understand to be the effect of that famous declaratory law, 32 Geo. III. c. 60. * * * I conclude, then, that when the Constitution of the United States was founded, it was a settled rule of the common law that, in criminal as well as in civil cases, the court decided the law, and the jury the facts; and it can not be doubted that this must have an important effect in determining what is meant by the Constitution when it adopts a trial by jury."

That eminent jurist, whose retirement from judicial station has never ceased to be a matter of deep regret to the bench and bar of this country, closed his great opinion with an expression of a firm conviction that, under the Constitution of the United States, juries in criminal cases have not the right to decide any question of law, and that, in rendering a general verdict, their duty and their oath require them to apply to the facts, as they find them, the law given to them by the court. And in so declaring he substantially repeated what Chief Justice Marshall had said in *Burr's Case*.

In *U. S. v. Greathouse*, 4 Sawy. 457, 464, Fed. Cas. No. 15,254, which was an indictment for treason, Mr. Justice Field said: "There prevails a very general, but an erroneous, opinion that in all criminal cases the jury are the judges as well of the law as of the fact; that is, that they have the right to disregard the law as laid down by the court, and to follow their own notions on the subject. Such is not the right of the jury." "It is their duty to take the law from the court, and apply it to the facts of the case. It is the province of the court, and of the court alone, to determine all questions of law arising in the progress of a trial; and it is the province of the jury to pass upon the evidence, and determine all contested questions of fact. The responsibility of deciding correctly as to the law rests solely with the court, and the responsibility of finding correctly the facts rests solely with the jury."

These principles were applied by Judge Shipman in *U. S. v. Riley*, 5 Blatchf. 204, Fed. Cas. No. 16,164, and by Judge Cranch, upon an extended review of the authorities, in *Stettinius v. U. S.*, 5 Cranch C. C. 573, Fed. Cas. No. 13,387. They were also applied by Judge Jackson, in the district of West Vir-

ginia, in *U. S. v. Keller*, 19 Fed. 633, in which case it was said that, although an acquittal in a criminal case was final, even if the jury arbitrarily disregarded the instructions of the court on the law of the case, a jury, in order to discharge its whole duty, must take the law from the court and apply it to the facts of the case.

Turning, now, to cases in the State courts, we find that in *Com. v. Porter*, 10 Metc. 263, 276, the Supreme Judicial Court of Massachusetts, speaking by Chief Justice Shaw, delivering the unanimous judgment of the court, composed of himself and Justices Wilde, Dewey and Hubbard, held that it was a well settled principle, lying at the foundation of jury trials, admitted and recognized ever since jury trial had been adopted as an established and settled mode of proceeding in courts of justice, that it was the proper province and duty of judges to consider and decide all questions of law, and the proper province and duty of the jury to decide all questions of fact. In the same case, the court, observing that the safety, efficiency and purity of jury trial depend upon the steady maintenance and practical application of this principle, and adverting to the fact that a jury, in rendering a general verdict, must necessarily pass upon the whole issue, compounded of the law and of the fact, and thus incidentally pass on questions of law, said: "It is the duty of the court to instruct the jury on all questions of law which appear to arise in the cause, and also upon all questions pertinent to the issue, upon which either party may request the direction of the court upon matters of law. And it is the duty of the jury to receive the law from the court, and to conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the facts to be found by them; and, it is not within the legitimate province of the jury to revise, reconsider or decide contrary to such opinion or direction of the court in matter of law."

Perhaps the fullest examination of the question upon principle, as well as upon authority, to be found in the decisions of any State court, was made in *Com. v. Anthes*, 5 Gray, 185, 193, 206, 208, 218, where Chief Justice Shaw, speaking for a majority of the court, said that the true theory and fundamental principle of the common law, both in its civil and criminal departments, was that the judges should adjudicate finally

upon the whole question of law, and the jury upon the whole question of fact.

Considering, in the light of the authorities, the grounds upon which a verdict of guilty or not guilty, in a criminal case, was held, at common law, to be conclusive, he observed that though the jury had the power they had not the right to decide, that is, to adjudicate, on both law and evidence. He said: "The result of these several rules and principles is that, in practice, the verdict of a jury, both upon the law and the fact, is conclusive; because, from the nature of the proceeding, there is no judicial power by which the conclusion of law thus brought upon the record by that verdict can be reversed, set aside, or inquired into. A general verdict, either of conviction or acquittal, does embody and declare the result of both the law and the fact, and there is no mode of separating them on the record so as to ascertain whether the jury passed their judgment on the law, or only on the evidence. The law authorized them to adjudicate definitively on the evidence; the law presumes that they acted upon correct rules of law given them by the judge. The verdict, therefore, stands conclusive and unquestionable in point both of law and fact. In a certain limited sense, therefore, it may be said that the jury have a power and a legal right to pass upon both the law and the fact. And this is sufficient to account for many and most of the *dicta* in which the proposition is stated. But it would be more accurate to state that it is the right of the jury to return a general verdict; this draws after it, as a necessary consequence, that they incidentally pass upon the law. But here again, is the question, what is intended by 'passing upon the law?' I think it is by embracing it in their verdict, and thus bringing it upon the record, with their finding of the facts. But does it follow that they may rightfully, and by authority of the common law, by which all are conscientiously bound to govern their conduct, proceed upon the same grounds and principles in the one case as the other? What the jury have a right to do, and what are the grounds and principles upon which they are in duty and conscience bound to act and govern themselves in the exercise of that right, are two very distinct questions. The latter is the one we have to deal with. Suppose they have a right to find a general verdict, and by that verdict to conclude the prosecutor in the matter of law,

still it is an open and very different question whether, in making up that verdict and thereby embracing the law, they have the same right to exercise their own reason and judgment, against the statement of the law by the judge, to adjudicate on the law, as unquestionably they have on the fact. The affirmative of this proposition is maintained by the defendant in this case, and by others in many of the cases before us. If I am right in the assumption that the judge is to adjudge the law, and the jury the fact, only, it furnishes the answer to this question, to what extent the jury adjudicate the law; and it is that they receive authoritative directions from the court, and act in conformity with them, though by their verdict they thus embrace the law with the fact, which they may rightfully adjudicate."

Alluding to the history of this question in England, and particularly, as did Mr. Justice Curtis, to the controversy in *King v. Dean of St. Asaph*, 3 Term R. 428, note, and which resulted in the passage by Parliament, after the separation of this country from Great Britain, of the Libel Act (St. 32 Geo. III.), and observing that both parties to that controversy assumed the force and existence of the rule as the ancient rule of the common law, the court said: "The court and high prerogative party say judges answer to the law, and jurors to the fact; the question of guilty or not, in the peculiar form of a criminal prosecution for libel, after the jury have found the fact of publication and truth of the innuendoes, is a question of law, and therefore must be declared exclusively by the court. The popular party, assuming the same major proposition, say the question of guilty or not is a question of fact, and can be found only by the jury. It appears to me, therefore, as I stated on the outset, that considering the course of the controversy, the earnestness and ability with which every point was contested, and the thorough examination of the ancient authorities, this concurrence of views on the point in question affords strong proof that, up to the period of our separation from England, the fundamental definition of trials by jury depended on the universal maxim, without an exception, '*Ad quaestionem facti respondent juratores, ad quaestionem juris respondent iudices.*'"

The Anthes case, it may be observed, arose under a statute enacted in 1835, after the decision in the Porter case. But the

court held that that statute did not confer upon juries, in criminal trials, the power of determining questions of law against the instructions of the court. And the Chief Justice said—Justices Metcalf and Merrick concurring—that, if the statute could be so interpreted as to prescribe that the jury, consistently with their duty, may decide the law upon their judgment contrary to the decision and instruction of the court, before whom the trial was had, such enactment would be beyond the scope of legitimate legislative power, repugnant to the Constitution, and, of course, inoperative and void. See also, *Com. v. Rock*, 10 Gray, 4, where the doctrines announced in *Com. v. Anthes* were re-affirmed, no one of the members of the court expressing a dissent.

This question was also fully considered in *Montee v. Com.*, 3 J. J. Marsh. 132, 149, 151, in which case Chief Justice Robertson said: "The Circuit Judge would be a cipher, and a criminal trial before him a farce, if he had no right to decide all questions of law which might arise in the progress of the case. The jury are the exclusive judges of the facts. In this particular they can not be controlled, and ought not to be instructed, by the court. They are also, *ex necessitate*, the ultimate judges, in one respect, of the law. If they acquit, the judge can not grant a new trial, how much soever they have misconceived or disregarded the law." "If the court had no right to decide on the law, error, confusion, uncertainty, and licentiousness would characterize the criminal trials; and the safety of the accused might be as much endangered as the stability of public justice would certainly be." In *Pierce v. State*, 13 N. H. 536, 554, it was held to be inconsistent with the spirit of the Constitution that questions of law, and, still less, questions of constitutional law, should be decided by the verdict of the jury, contrary to the instructions of the court.

In *Duffy v. People*, 26 N. Y. 588, 592, Judge Selden, speaking for the Court of Appeals of New York, said: "The unquestionable power of juries to find general verdicts, involving both law and fact, furnishes the foundation for the opinion that they are judges of the law as well as of the facts, and gives some plausibility to that opinion. They are not, however, compelled to decide legal questions, having the right to find special verdicts, giving the facts, and leaving the legal conclusions which result from such facts to the court. When

they find general verdicts, I think it is their duty to be governed by the instructions of the court as to all legal questions involved in such verdicts. They have the power to do otherwise, but the exercise of such power can not be regarded as rightful, although the law has provided no means, in criminal cases, of reviewing their decisions, whether of law or fact, or of ascertaining the grounds upon which their verdicts are based." See, also, *People v. Finnegan*, 1 Parker Cr. R. 147, 152; *Safford v. People*, Id. 474, 480.

So, in *Hamilton v. People*, 29 Mich. 173, 192, Mr. Justice Campbell, as the organ of the court, said: "We understand the uniform practice and the decided weight of opinion to require that the judge give his views of the law to the jury as authority, and not as a matter to be submitted to their review." And in *People v. Anderson*, 44 Cal. 65, 70: "In this State it is so well settled as no longer to be open to debate that it is the duty of a jury, in a criminal case, to take the law from the court."

The principle was accurately stated by Chief Justice Ames, speaking for the Supreme Court of Rhode Island, when he said: "The line between the duties of the court and jury in the trial of causes at law, both civil and criminal, is perfectly well defined; and the rigid observance of it is of the last importance to the administration of systematic justice. While, on the one hand, the jury are the sole, ultimate judges of the facts, they are, on the other, to receive the law applicable to the case before them solely from the publicly given instructions of the court. In this way, court and jury are made responsible, each in its appropriate department, for the part taken by each in the trial and decision of causes; and in this way alone can errors of fact and errors of law be traced, for the purpose of correction, to their proper sources. If the jury can receive the law of a case on trial in any other mode than from the instructions of the court, given in the presence of parties and counsel, how are their errors of law, with any certainty, to be detected, and how with any certainty, therefore, to be corrected? It is a statute right of parties here—following, too, the ancient course of the common law—to have the law given by the court, in their presence, to the jury, to guide their decision, in order that every error in matter of law may be known and corrected." *State v. Smith*, 5 R. I. 33, 34.

In Pennsylvania, in the case of *Com. v. Sherry* (reported in the appendix to Wharton's treatise on Homicide), Judge Rogers, a jurist of high reputation, thus charged the jury in a capital case: "You are, it is true, judges in a criminal case, in one sense, of both law and fact, for your verdict, as in civil cases, must pass on law and fact together. If you acquit, you interpose a final bar to a second prosecution, no matter how entirely your verdict may have been in opposition to the views expressed by the court. * * * It is important for you to keep this distinction in mind, remembering that, while you have the physical power, by an acquittal, to discharge a defendant from further prosecution, you have no moral power to do so, against the law laid down by the court. * * * For your part, your duty is to receive the law, for the purposes of this trial, from the court. If an error, injurious to the prisoner, occurs, it will be rectified by the revision of the court *in banc*. But an error resulting from either a conviction or acquittal, against the law, can never be rectified. In the first case, an unnecessary stigma is affixed to the character of a man who was not guilty of the offense with which he is charged. In the second case, a serious injury is affected by the arbitrary and irremediable discharge of a guilty man. You will see from these considerations the great importance of the preservation, in criminal as well as in civil cases, of the maxim that the law belongs to the court, and the facts to the jury." About the same time, Judge Sergeant charged a jury: "The point, if you believe the evidence on both sides, is one of law, on which it is your duty to receive the instructions of the court. If you believe the evidence in the whole case, you must find the defendant guilty." *Com. v. Van Sickle*, Brightly (Pa.) 73.

To the same effect, substantially, was the language of Chief Justice Gibson, who, when closing a charge in a capital case, said: "If the evidence on these points fail the prisoner, the conclusion of his guilt will be irresistible, and it will be your duty to draw it." *Com. v. Harman*, 4 Pa. St. 269. In a more recent case (*Kane v. Com.*, 89 Pa. St. 522), Sharswood, C. J., said that the power of the jury to judge of the law in a criminal case was one of the most valuable securities guaranteed by the bill of rights of Pennsylvania. But in a later case, *Nicholson v. Com.*, 96 Pa. St. 505, it is said: "The court had an un-

doubted right to instruct the jury as to the law, and to warn them as they did against finding contrary to it. This is very different from telling them that they must find the defendant guilty, which is what is meant by a binding instruction in criminal cases." In *Com. v. McManus*, 143 Pa. St. 64, 85, it was adjudged that the statement by the court was the best evidence of the law within the reach of the jury, and that the jury should be guided by what the court said as to the law. And this view the court, speaking by Chief Justice Paxson, said was in harmony with *Kane v. Com.*

The question has recently been examined by the Supreme Court of Vermont, and after an elaborate review of the authorities, English and American, that court, by a unanimous judgment—overruling *State v. Croteau*, 23 Vt. 14, and all the previous cases which had followed that case—said: "We are thus led to the conclusion that the doctrine that jurors are the judges of the law in criminal cases is untenable; that it is contrary to the fundamental maxims of the common law from which it is claimed to take its origin; contrary to the uniform practice and decisions of the courts of Great Britain, where our jury system had its beginning, and where it matured; contrary to the great weight of authority in this country; contrary to the spirit and meaning of the Constitution of the United States; repugnant to the Constitution of this State; repugnant to our statute relative to the reservation of questions of law in criminal cases, and passing the same to the Supreme Court for final decision." *State v. Burpee*, 65 Vt. 1, 34.

These principles are supported by a very large number of adjudications, as will be seen by an examination of the cases cited in margin.¹

¹ *People v. Wright*, 93 Cal. 564; *Brown v. Com.*, 87 Va. 215; *People v. Barry*, 90 Cal. 41; *People v. Madden*, 76 Cal. 521; *State v. Jeandell*, 5 Har. (Del.) 475; *State v. Wright*, 53 Me. 328; *Com. v. Van Tuyl*, 1 Mete. (Ky.) 1; *Montgomery v. State*, 11 Ohio, 427; *Adams v. State*, 29 Ohio St. 412; *Robbins v. State*, 8 Ohio St. 131, 167; *Williams v. State*, 32 Miss. 289, 396; *Pleasant v. State*, 13 Ark. 360, 372; *Robinson v. State*, 66 Ga. 517; *Brown v. State*, 40 Ga. 689, 695; *Hunt v. State*, 81 Ga. 140; *State v. Drawdy*, 14 Mich. Law, 87; *Nels v. State*, 2 Tex. 280; *Myers v. State*, 33 Tex. 525; *State v. Jones*, 64 Mo. 391; *Hardy v. State*, 7 Mo. 607; *State v. Elwood*, 73 N. C. 189; *State v. McLain*, 104 N. C. 894; *People v. Neumann*, 85 Mich. 98; *State v. Johnson*, 30 La. Ann. 1, p. 904; *State v. Ford*, 37 La. Ann. 443, 465; *Fisler v. Railway Co.*, 131 Pa. St. 292, 297; *Railway Co. v. Hutchinson*, 40 Kan. 51.

To the same purport are the text writers. "In theory, therefore," says Judge Cooley, "the rule of law would seem to be that it is the duty of the jury to receive and follow the law as delivered to them by the court; and such is the clear weight of authority." Const. Lim. 323, 324. Greenleaf, in his treatise on the law of evidence, says: "In trials by jury, it is the province of the presiding judge to determine all questions on the admissibility of evidence to the jury, as well as to instruct them in the rules of law by which it is to be weighed. Whether there be any evidence or not is a question for the judge; whether it is sufficient evidence is a question for the jury." "Where the question is mixed, consisting of law and fact, so intimately blended as not to be easily susceptible of separate decision, it is submitted to the jury, who are first instructed by the judge in the principles and rules of law by which they are to be governed in finding a verdict, and these instructions they are bound to follow." Volume 1, § 49. Starkie, in his treatise on Evidence, observes: "Where the jury find a general verdict, they are bound to apply the law as delivered by the court, in criminal as well as civil cases." Page 816. So, in Phillips on Evidence: "They (the jury) are not, in general, either in civil or criminal cases, judges of the law. They are bound to find the law as it is propounded to them by the court. They may, indeed, find a general verdict, including both law and fact; but, if in such verdict, they find the law contrary to the instructions of the court, they thereby violate their oath." Cowen & Hill's Notes (3d Ed.), p. 2, 1501. See, also, 1 Tayl., Ev. §§ 21-24; 1 Best, Ev. (Morgan's Ed.), § 82.

In 1 Cr. Law Mag., 51, will be found a valuable note to the case of *Kane v. Com.*, prepared by Mr. Wharton, in which the authorities are fully examined, and in which he says: "It would be absurd to say that the determination of the law belongs to the jury, not court, if the court has power to set aside that which the jury determines. We must hold, to enable us to avoid inconsistency, that, subject to the qualification that all acquittals are final, the law in criminal cases is to be determined by the court. In this way we have our liberties and rights determined, not by an irresponsible, but by a responsible, tribunal; not by a tribunal ignorant of the law, but by a tribunal trained to and disciplined by the law; not by an

irreversible tribunal, but by a reversible tribunal; not by a tribunal which makes its own law, but by a tribunal that obeys the law as made. In this way we maintain two fundamental maxims. The first is, that while to facts answer juries, to the law answers the court. The second, which is still more important, is '*Nullum crimen, nulla poena, sine lege.*' Unless there be a violation of law pre-announced, and this by a constant and responsible tribunal, there is no crime, and can be no punishment." 1 Cr. Law Mag. 56. The same author, in his treatise on Pleading and Practice, concludes his examination of the question in these words: "The conclusion we must therefore accept is that the jury are no more judges of law in criminal than in civil cases, with the qualification that, owing to the peculiar doctrine of *autrefois acquit*, a criminal acquitted can not be overhauled by the court. In the Federal courts such is now the established rule." Sections 809, 810.

Forsyth, in his History of Trial by Jury—a work of merit—discusses the doctrine, advanced by some, that the jury were entitled, in all cases, where no special pleas have been put on the record, to give a general verdict, according to their own views of the law, in criminal as well as in civil cases. He says: "It is impossible to uphold the doctrine. It is founded on a confusion between the ideas of power and right." "Indeed, it is difficult to understand how any one, acquainted with the principles and settled practice of the English law, can assert that it sanctions the doctrine which is here combated." Again: "The distinction between the province of the judge and that of the jury is, in the English law, clearly defined, and observed with jealous accuracy. The jury must, in all cases, determine the value and effect of evidence which is submitted to them. They must decide what degree of credit is to be given to a witness, and hold the balance between conflicting probabilities. The law throws upon them the whole responsibility of ascertaining facts in dispute, and the judge does not attempt to interfere with the exercise of their unfettered discretion in this respect. But, on the other hand, the judge has his peculiar duty in the conduct of a trial. He must determine whether the kind of evidence offered is such as ought, or ought not, to be submitted to the jury, and what liabilities it imposes. When any questions of law arise, he alone determines them, and their consideration is absolutely withdrawn

from the jury, who must, in such cases, follow the direction of the judge; or, if they perversely refuse to do so, their verdict (in civil cases) will be set aside, and a new trial granted." Pages 235, 236 (Morgan's Ed.); London Ed., 1852, pp. 261, 262, 282.

Worthington, in his *Inquiry into the Power of Juries*, an English work published in 1825, and often cited in the adjudged cases, says:

"Were they (the jury) permitted to decide the law, the principles of justice would be subverted; the law would become as variable as the prejudices, the inclinations and the passions of men. If they could legally decide upon questions of law, their decision must, of necessity, be final and conclusive, which would involve an absurdity in all judicial proceedings, and would be contradictory to the fundamental principles of our jurisprudence." "The jury, when called upon to decide facts which are complicated with law, are therefore constitutionally, and must be, from the nature and intention of the institution, bound to seek and to obey the direction of the judge with respect to the law. It becomes their duty to apply to the law thus explained to them the facts (which it is their exclusive province to find), and thus they deliver a verdict compounded of law and fact, but they do not determine or decide upon the law in any case." Pages 193, 194.

Judge Thompson, in his work on *Trials* (sections 1016, 1017), thus states the principles: "The judge decides questions of law; the jury, questions of fact." So, in *Proffat, Jury*, § 375: "The preponderance of judicial authority in this country is in favor of the doctrine that the jury should take the law from the court, and apply it to the evidence under its direction."

The language of some judges and statesmen in the early history of the country, implying that the jury were entitled to disregard the law as expounded by the court, is, perhaps, to be explained by the fact that "in many of the States the arbitrary temper of the colonial judges, holding office directly from the crown, had made the independence of the jury, in law as well as in fact, of much popular importance." Whart. Cr. Pl. (8th Ed.), § 806; *Williams v. State*, 32 Miss. 389, 396.

Notwithstanding the declarations of eminent jurists and of numerous courts, as disclosed in the authorities cited, it is sometimes confidently asserted that they all erred when ad-

judging that the rule at common law was that the jury, in criminal cases, could not properly disregard the law as given by the court. We are of opinion that the law in England at the date of our separation from that country was as declared in the authorities we have cited. The contrary view rests, as we think, in large part, upon expressions of certain judges and writers, enforcing the principle that when the question is compounded of law and fact a general verdict, *ex necessitate*, disposes of the case in hand, both as to law and fact. This is what Lord Somers meant when he said in his essay on "The Security of Englishmen's Lives, or the Trust, Power and Duty of the Grand Juries of England," that jurors only "are the judges from whose sentence the indicted are to expect life or death," and that, "by finding guilty or not guilty, they do completely resolve both law and fact." In the speeches of many statesmen, and in the utterances of many jurists, will be found the general observation that when law and fact are "blended" their combined consideration is for the jury, and a verdict of guilty or not guilty will determine both for the particular case in hand. But this falls far short of the contention that the jury, in applying the law to the facts, may rightfully refuse to act upon the principles of law announced by the court.

It is to be observed that those who have maintained the broad position that a jury may, of right, disregard the law as declared by the court, cite the judgment of Chief Justice Vaughan in *Bushell's case*, Vaughan, 135. In that case the accused were acquitted by a general verdict, in opposition, as it was charged, to the directions of the court. And the question presented upon *habeas corpus* was whether, for so doing, they were subject to be fined, and committed to prison until the fine was paid. Upon a careful examination of the elaborate opinion in that case, it will become clear that the fundamental proposition decided was that in view of the different functions of court and jury, and because a general verdict, of necessity, resolves "both law and fact complicately, and not the fact by itself," it could never be proved, where the case went to the jury upon both law and facts, that the jurors did not proceed upon their view of the evidence. Chief Justice Vaughan said that the words in the warrant, "that the jury did acquit against the direction of the court in matter of law, literally taken, and *de plano*, are insignificant, and not intelli-

gible, for no issue can be joined of matter in law; no jury can be charged with the trial of matter in law barely; no evidence ever was or can be given to a jury of what is law or not, nor no such oath can be given to or taken by a jury, to try matter in law, nor no attaint can lie for such a false oath." *Id.* 143. Touching the distinction between the oath of a witness and that of a juror, he said: "A witness swears but to what hath fallen under his senses. But a juryman swears to what he can infer and conclude from the testimony of such witnesses, by the act and force of his own understanding, to be the fact inquired after, which differs nothing in the reason, though much in the punishment, from what a judge, out of various cases considered by him, infers to be law in the question before him." *Id.* 139, 142.

In referring to the opinion in *Bushell's case*, Mr. Justice Curtis well observed that it would be found that Chief Justice Vaughan "confines himself to a narrow, though, for the case, a conclusive line of argument—that, the general issue embracing fact as well as law, it can never be proved that the jury believed the testimony on which the fact depended, and in reference to which the direction was given, and so they can not be shown to be guilty of any legal misdemeanor in returning a verdict, though apparently against the direction of the court in matter of law." And this is the view of the opinion in *Bushell's case*, expressed by Hallam in his *Constitutional History of England* (chapter 13).

A similar criticism was made by the Supreme Judicial Court of Massachusetts in the case of *Anthes*. Chief Justice Shaw, after stating the principles involved in *Bushell's case*, said: "It may be remarked that from the improved views of the nature of jury trials during the two hundred years which have elapsed since the decision of Chief Justice Vaughan, the juror is now in no more danger of punishment for giving an erroneous judgment in matter of fact than a judge is for giving an erroneous judgment in matter of law. But his statement clearly implies that the judge, within his appropriate sphere, is to act by the force of his reason and understanding, and by the aid of his knowledge of the law and all appropriate means, to adjudge all questions of law, and direct the jury thereon; and in like manner the jury, by the force of their reason and understanding, acting upon all the competent evidence in the

case, to reason, weigh evidence, draw inferences, and adjudge the question of fact embraced in the issue. Again, 'In these cases the jury, and not the judge, resolve and find what the fact is. Therefore, always, in discreet and lawful assistance of the jury, the judge's direction is hypothetical and upon supposition, and not positive upon coercion, namely: "If you find the fact thus (leaving it to them what to find), then you are to find for the plaintiff; but if you find the fact thus, then it is for the defendant." Vaughan, 144.' "It is strange," Chief Justice Shaw felt constrained to say, "that the authority of Vaughan, C. J., in this case, should be cited, as it has been, to prove that a juror, in finding a general verdict, embracing law and fact, being sworn to try the issue, must find his verdict upon his own conviction and conscience, relying, in support of the proposition, upon the following words of Vaughan, C. J., 'A man can not see by another's eye, nor hear by another's ear. No more can a man decide and infer the thing to be resolved by another's understanding or reasoning.' *Id.* 148." Had these words been applied to the whole issue embraced in a general verdict, as would be implied from the manner of referring to them, they would have countenanced the proposition; but they are used expressly to illustrate the position that the jury can not be required implicitly to give a verdict by the dictates and authority of the judge. "I refer," Chief Justice Shaw continued, "only to one other passage, which serves as a key to the whole judgment. He says: 'That *de-cantatum* in our books, *Ad quaestionem facti non respondent iudices, ad quaestionem legis non respondent juratores*, literally taken, is true, for if it be demanded, what is the fact? the judge can not answer; if it be asked, what is the law in the case? the jury can not answer it.' *Id.* 149." All this tends to show that the leading thought in the opinion of Chief Justice Vaughan was, that while the jury can not answer as to the law, nor the court as to the fact, a general verdict, compounded of law and fact, of necessity determines both as to the case on trial.

In Townsend's case, an office taken by virtue of a writ of *mandamus*, and decided in the sixteenth century, the court said: "For the office of twelve men is no other than to inquire of matters of fact, and not to adjudge what the law is, for that is the office of the court, and not of the jury; and if

they find the matter of fact at large, and further say that thereupon the law is so, where, in truth, the law is not so, the judges shall adjudge according to the matter of fact, and not according to the conclusion of the jury." 1 Plow. 110, 114. In *Willion v. Berkely*, *Id.* 223, 230, also a civil case: "Matters of fact, being traversed, shall be tried by twelve men; and, if the plaintiff should take a traverse here, it would be to make twelve illiterate men try a matter of law, whereof they have no knowledge. It is not their office to try matters of law, but only to try matters of fact; for at the beginning of our law it was ordained that matters of fact should be tried by twelve men of the country where the matter arises, and matters of law by twelve judges of the law, for which purpose there were six judges here, and six in the King's Bench, who, upon matters of law, used to assemble together in a certain place, in order to discuss what the law was therein. So that, if a traverse should be here taken, it would be to make twelve ignorant men of the country try that whereof they are not judges, and which does not belong to them to try." See, also, *Grendon v. Bishop of London*, 2 Plow. 493, 496.

As early as 1727, Raymond, C. J., delivering the unanimous opinion of the twelve judges of the King's Bench in a case of murder, said that the jury are judges only of the fact, and the court of the law. 2 Strange, 766, 773. The force of this language, as to the functions of judge and jury, is not materially weakened by the fact that the case was before the judges upon a special verdict, for it was expressly declared that jurors were judges only of the fact.

Within a few years after *Oneby's* case (2 Strange, 766) was determined, in 1734, the case of *King v. Poole*, which was a criminal information in the nature of a *quo warranto*, came before Lord Hardwicke. In passing upon a motion for a new trial, that famous judge—than whom there could be no higher authority as to what was the settled law of England—said: "The thing that governs greatly in this determination is, that the point of law is not to be determined by juries; juries have a power by law to determine matters of fact only; and it is of the greatest consequence to the law of England, and to the subject, that these powers of the judge and the jury are kept distinct; that the judge determines the law, and the jury the fact; and if ever they come to be confounded, it will prove

the confusion and destruction of the law of England." Cas. t. Hardw. 27.

Upon the question here under examination Mr. Foster, to whose work Chief Justice Marshall frequently refers in his opinion or charge delivered in Burr's case, says, in the first edition of his work, which appeared in 1762, and again in the third edition, which appeared in 1792: "In every case where the point turneth upon the question whether the homicide was committed wilfully and maliciously, or under circumstances justifying, excusing or alleviating the matter of fact, viz., whether the facts alleged by way of justification, excuse or alleviation are true, is the proper and only province of the jury. But whether, upon a supposition of the truth of facts, such homicide be justified, excused or alleviated, must be submitted to the judgment of the court; for the construction the law putteth upon facts stated and agreed, or found by a jury, is in this, as in all other cases, undoubtedly the proper province of the court. In cases of doubt and real difficulty it is commonly recommended to the jury to state facts and circumstances in a special verdict. But where the law is clear, the jury, under the direction of the court in point of law, matters of fact being still left to their determination, may, and, if they are well advised, always will, find a general verdict conformably to such direction." Fost. Cr. Law (3d Ed.), 255, 256. See, also, *King v. Withers* (Lord Kenyon), 3 Term R. 428; Bac. Abr. Tit. "Juries," M 2; 2 Hawk. P. C. c. 22, § 21; 1 Duncomb, Trials per Pais (Dublin, 1793), pp. 229, 231.

In Wynne's *Eunomus*, or *Dialogues Concerning the Law and Constitution of England*, a work of considerable reputation, the first edition having been published about the time of the adoption of our Constitution, the principle is thus stated: "All that I have said or have to say upon the subject of juries is agreeable to the established maxim that 'juries must answer to questions of fact, and judges to questions of law.' This is the fundamental maxim acknowledged by the constitution." "It is undoubtedly true that the jury are judges—the only judges—of the fact. Is it not equally within the spirit of the maxim that judges only have the competent cognizance of the law? Can it be contended that the jury have in reality an adequate knowledge of law? Or that the constitution ever designed they should?" "Well—'but the law and the fact

are often complicated'—then it is the province of the judge to distinguish them; to tell the jury that, supposing such and such facts were done, what the law is in such circumstances. This is an unbiased direction; this keeps the province of judge and jury distinct; the facts are left altogether to the jury, and the law does not control the fact, but arises from it." "Every verdict is compounded of law and fact, but the law and fact are always distinct in their nature." Wynne, Eunomus, Dialogue 3 (5th Ed. 1822), § 53, pp. 523, 527, 528.

Mr. Stephens, in his great work on the History of the Criminal Law of England, in discussing the powers of juries in France says: "The right of the counsel for the defense to address the jury on questions of law, as, for instance, whether killing in a duel is *meurtre*, is one of the features in which the administration of justice in France differs essentially from the administration of justice in England. In England the judge's duty is to direct the jury in all matters of law, and any arguments of counsel upon the subject must be addressed to him, and not to the jury. This is not only perfectly well established as matter of law, but it is as a fact acquiesced in by all whom it concerns." Volume 1, p. 551.

To the same effect is *Levy v. Milne*, 4 Bing. 196, reported as *Levy v. Milne*, 12 Moore, 418, and decided in 1827. That was an action of libel. Mr. Sergeant Wilde, a counsel in the case, contended that in cases of libel the jury are judges of the law as well as of the fact. But Lord Chief Justice Best said: "If the jury were to be made judges of the law as well as of fact, parties would be always liable to suffer from an arbitrary decision. In the present case the jury have made themselves judges of the law, and have found against it." "My Brother Wilde has stated that in cases of libel the jury are judges of the law as well as of fact, but I beg to deny that. Juries are not judges of the law, or, at any rate, not in civil actions. The authority on which the learned sergeant has probably grounded his supposition is 32 Geo. III., c. 60, which was the famous bill brought in by Mr. Fox, or, more properly, by Lord Erskine. But whoever reads that act will see that it does not apply to civil actions; it applies only to criminal cases. There is nothing in it that in any way touches civil actions, and the jury, with respect to them, stand in the same situation as they ever have done. I mean, however, to protest against juries, even in

criminal cases, becoming judges of the law. The act only says that they may find a general verdict. Has a jury then a right to act against the opinion of the judge, and to return a verdict on their own construction of the law? I am clearly of opinion that they have not." The report by Moore of this opinion is not as full as the report in Bingham, but the two reports do not differ in any material respect.

But a later decision was that by Lord Abinger, C. B., in 1837, in *Reg. v. Parish*, 8 Car. & P. 94. That was an indictment for offering, disposing of, and putting off a forged bill of exchange. In the course of his argument to the jury the counsel for the accused read the observations of Mr. Justice Coleridge in a certain case as sustaining his view of the law. He was interrupted by the judge, who said: "I can not allow you to read cases to the jury. It is the duty of the jury to take the law from the judge. It no doubt often happens that, in an address to the jury counsel cite cases, but then it is considered that that part of the speech of the counsel is addressed to the judge. That can not be so here, as you very properly in the first instance referred me to the case, and you have my opinion upon it; you can therefore make no further legitimate use of the case, and the only effect of reading it would be to discuss propositions of law with the jury, with which they have nothing to do, and which they ought to take from me."

The case of *Parmiter v. Coupeland*, 6 Mees. & W. 104, 106, 108, which was an action for libel, is not without value, as tending to show that Fox's libel bill, so far from changing the rule, as generally applicable in criminal cases, only required the same practice to be pursued in prosecutions for libel as in other criminal cases. In the course of the argument of counsel, Parke, B., said: "In criminal cases the judge is to define the crime, and the jury are to find whether the party has committed that offense. Mr. Fox's act made it the same in cases of libel, the practice having been otherwise before." Again: "But it has been the course for a long time for a judge, in cases of libel, as in other cases of a criminal nature, first to give a legal definition of the offense, and then to leave it to the jury to say whether the facts necessary to constitute that offense are proved to their satisfaction; and that whether the libel is the subject of a criminal prosecution or civil action. A publication, without justification or lawful excuse, which is cal-

culated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel. Whether the particular publication, the subject of inquiry, is of that character, and would be likely to produce that effect, is a question upon which a jury is to exercise their judgment, and pronounce their opinion, as a question of fact. The judge, as a matter of advice to them in deciding that question, might have given his own opinion as to the nature of the publication, but was not bound to do so as a matter of law. Mr. Fox's libel bill was a declaratory act, and put prosecution for libel on the same footing as other criminal cases." Alderson, B., concurring, said that the judge "ought, having defined what is a libel, to refer to the jury the consideration of the particular publication, whether falling within that definition or not."

It is therefore a mistake to suppose that the English libel act changed in any degree the general common-law rule in criminal cases, as to the right of the court to decide the law, and the duty of the jury to apply the law thus given to the facts, subject to the condition, inseparable from the jury system, that the jury, by a general verdict, of necessity determined in the particular case both law and fact, as compounded in the issue submitted to them. That act provides that "the court or judge, before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the king and the defendant, in like manner as in other criminal cases." "This seems," Mr. Justice Curtis well said, "to carry the clearest implication that in this and all other criminal cases the jury may be directed by the judge, and that, while the object of the statute was to declare that there was other matter of fact besides publication and the innuendoes to be decided by the jury, it was not intended to interfere with the proper province of the judge to decide all matters of law." *U. S. v. Morris*, 1 Curt. 55, Fed. Cas. No. 15,815. And this accords with the views expressed by Lord Abinger in *Reeves v. Templar*, 2 Jur. 137. He said: "Before that statute a practice had arisen of considering that the question, libel or no libel, was always for the court, independent of the intention and meaning of the party publishing. That statute corrected the error, and now, if the intention does not appear on the body of the libel, a variety of circumstances are to be left to

the jury from which to infer it; but it was never intended to take from the court the power of deciding whether certain words are, *per se*, libelous or not."

The rule that jurors do not respond to questions of law, was illustrated in *Bishop of Meath v. Marquis of Winchester*, 4 Clark & F. 555, 556, 557, where Lord Chief Justice Tindal, delivering the unanimous opinion of the judges, said: "With respect to the second question lastly above proposed to us, viz., whether, if the fine were received in evidence it ought to be left to the jury to say whether it barred the action of *quare impedit*, we all think that the legal effect of such fine as a bar to the action of *quare impedit* is a matter of law merely, and not in any way a matter of fact; and, consequently, the judge who tried the cause should state to the jury whether, in point of law, the fine had that effect, or what other effect, on the rights of the litigant parties, upon the general and acknowledged principle '*ad quaestionem juris non respondent juratores*.'"

Briefly stated, the contention of the accused is that, although there may not have been any evidence whatever to support a verdict of guilty of an offense less than the one charged, and such was the case here, yet, to charge the jury, as matter of law, that the evidence in the case did not authorize any verdict except one of guilty or one of not guilty of the particular offense charged, was an interference with their legitimate functions, and therefore with the constitutional right of the accused to be tried by a jury.

The error in the argument on behalf of the accused is in making the general rule as to the respective functions of court and jury applicable equally to a case in which there is some substantial evidence to support the particular right asserted, and a case in which there is an entire absence of evidence to establish such right. In the former class of cases the court may not, without impairing the constitutional right of trial by jury, do what, in the latter cases, it may often do without at all intrenching upon the constitutional functions of the jury. The law makes it the duty of the jury to return a verdict according to the evidence in the particular case before them. But, if there are no facts in evidence bearing upon the issue to be determined, it is the duty of the court, especially when so requested, to instruct them as to the law arising out of that state

of case. So, if there be some evidence bearing upon a particular issue in a cause, but it is so meager as not, in law, to justify a verdict in favor of the party producing it, the court is in the line of duty when it so declares to the jury. *Pleasant v. Fant*, 22 Wall. 116, 121; *Montclair v. Dana*, 107 U. S. 162; *Randall v. Railroad Co.*, 109 U. S. 478, 482; *Schofield v. Railway Co.*, 114 U. S. 615, 619; *Marshall v. Hubbard*, 117 U. S. 415, 419; *Meehan v. Valentine*, 145 U. S. 611, 625.

The cases just cited were, it is true, of a civil nature; but the rules they announce are, with few exceptions, applicable to criminal causes, and indicate the true test for determining the respective functions of court and jury. Who can doubt, for instance, that the court has the right, even in a capital case, to instruct the jury as matter of law to return a verdict of acquittal on the evidence adduced by the prosecution? Could it be said, in view of the established principles of criminal law, that such an instruction intrenched upon the province of the jury to determine from the evidence whether the accused was guilty or not guilty of the offense charged, or of some lesser offense included in the one charged? Under a given state of facts, outlined in an instruction to the jury, certain legal presumptions may arise. May not the court tell the jury what those presumptions are, and should not the jury assume that they are told truly? If the court excludes evidence given in the hearing of the jury, and instructs them to disregard it altogether, is it not their duty to obey that instruction, whatever may be their view of the admissibility of such evidence? In *Smith v. U. S.*, 151 U. S. 50, 55, which was an indictment for the murder, in the Indian Territory, of one Gentry, "a white man, and not an Indian," we said: "That Gentry was a white man, and not an Indian, was a fact which the government was bound to establish, and, if it failed to introduce any evidence upon that point, defendant was entitled to an instruction to that effect. Without expressing any opinion as to the correctness of the legal propositions embodied in this charge, we think there was no testimony which authorized the court to submit to the jury the question whether Gentry was a white man and not an Indian. The objection went to the jurisdiction of the court, and, if no other reasonable inference could have been drawn from the evidence that Gentry was an Indian, defendant was entitled, as matter of law, to an acquittal," citing

Pleasants v. Fant, 22 Wall. 116; *Commissioners v. Clark*, 94 U. S. 278; and *Marshall v. Hubbard*, 117 U. S. 415. So, in this case, it was competent for the court to say to the jury, that on account of the absence of all evidence tending to show that the defendants were guilty of manslaughter, they could not, consistently with law, return a verdict of guilty of that crime.

Any other rule than that indicated in the above observations, would bring confusion and uncertainty in the administration of the criminal law. Indeed, if a jury may rightfully disregard the direction of the court in matter of law, and determine for themselves what the law is in the particular case before them, it is difficult to perceive any legal ground upon which a verdict of conviction can be set aside by the court as being against law. If it be the function of the jury to decide the law as well as the facts—if the function of the court be only advisory as to the law—why should the court interfere for the protection of the accused against what it deems an error of the jury in matter of law?

Public and private safety alike would be in peril if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves. Under such a system, the principal function of the judge would be to preside and keep order while jurymen, untrained in the law, would determine questions affecting life, liberty or property, according to such legal principles as, in their judgment, were applicable to the particular case being tried. If because, generally speaking, it is the function of the jury to determine the guilt or innocence of the accused, according to the evidence, of the truth or weight of which they are to judge, the court should be held bound to instruct them upon a point in respect to which there was no evidence whatever, or to forbear stating what the law is upon a given state of facts, the result would be that the enforcement of the law against criminals, and the protection of citizens against unjust and groundless prosecutions would depend entirely upon juries uncontrolled by any settled, fixed, legal principles. And if it be true that jurors in a criminal case are under no legal obligation to take the law from the court, and may determine for themselves what the law is, it necessarily results that counsel for the accused may, of right, in the pres-

ence of both court and jury, contend that what the court declares to be the law applicable to the case in hand is not the law, and, in support of his contention, read to the jury the reports of adjudged cases, and the views of elementary writers.

Undoubtedly, in some jurisdictions, where juries in criminal cases have the right, in virtue of constitutional or statutory provisions, to decide both law and facts upon their own judgment as to what the law is and as to what the facts are, it may be the privilege of counsel to read and discuss adjudged cases before the jury. And in a few jurisdictions, in which it is held that the court alone responds as to the law, that practice is allowed in deference to long usage. But upon principle, where the matter is not controlled by express constitutional or statutory provisions, it can not be regarded as the right of counsel to dispute before the jury the law as declared by the court. Under the contrary view, if it be held that the court may not authoritatively decide all questions of law arising in criminal cases, the result will be that when a new trial in a criminal case is ordered, even by this court, the jury, upon such trial, may of right return a verdict based upon the assumption that what this court has adjudged to be law is not law. We can not give our sanction to any rule that will lead to such a result. We must hold firmly to the doctrine that, in the courts of the United States, it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts, as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men. Liberty, regulated by law, is the underlying principle of our institutions.

To instruct the jury in a criminal case that the defendant can not properly be convicted of a crime less than that charged, or to refuse to instruct them in respect to the lesser offenses that might, under some circumstances, be included in the one

so charged—there being no evidence whatever upon which any verdict could be properly returned except one of guilty or one of not guilty of the particular offense charged—is not error; for the instructing, or refusing to instruct, under the circumstances named, rests upon legal principles or presumptions which it is the province of the court to declare for the guidance of the jury. In the case supposed, the court is as clearly in the exercise of its legitimate functions as it is when ruling that particular evidence offered is not competent, or that evidence once admitted shall be stricken out and not be considered by the jury, or when it withdraws from the jury all proof of confessions by the accused upon the ground that such confessions, not having been made freely and voluntarily, are inadmissible under the law as evidence against the accused.

These views are sustained by a very great weight of authority in this country. In *People v. Barry*, 90 Cal. 41 (which was a criminal prosecution for an assault with intent to commit robbery, the accused having been twice before convicted of petit larceny), it was held not to be error to refuse to instruct the jury that under the charge they might find him guilty of simple assault, because "the evidence tended to show that he was guilty of the crime charged or of no offense at all," and therefore "the instruction asked was not applicable to the facts of the case;" in *People v. McNutt*, 93 Cal. 658 (the offense charged being an assault with a deadly weapon and with intent to commit murder), that an instruction that the jury might convict of a simple assault could have been properly refused, because, "under the evidence, he was either guilty of an offense more serious than simple assault, or he was not guilty;" in *Clark v. Com.*, 123 Pa. St. 81 (a case of murder), that the omission of an instruction on the law of voluntary manslaughter, and the power of the jury to find it, was not error, because the murder was deliberate murder, and "there was no evidence on which it could be reduced to a milder form of homicide;" in *State v. Lane*, 64 Mo. 319, 324 (which was an indictment for murder in the first degree), that, "if the evidence makes out a case of murder in the first degree, and applies to that kind of killing, and no other, the court would commit no error in confining its instructions to that offense, and refusing to instruct either as to murder in the second degree or manslaughter in any of its various degrees," and when an instruc-

tion "is given for any less grade of offense, and there is no evidence upon which to base it," the judgment should be reversed for error; in *McCoy v. State*, 27 Tex. App. 415 (the charge being murder of the first degree), that the refusal to charge the law of murder in the second degree was not error, for the reason that, if the defendant was "criminally responsible at all for the homicide, the grade of the offense under the facts is not short of murder of the first degree;" in *State v. McKinney*, 111 N. C. 683 (a murder case), that, as there was no testimony on either side tending to show manslaughter, a charge that there was no element of manslaughter in the case, and that the defendant was guilty of murder or not guilty of anything at all, as the jury should find the facts, was strictly in accordance with the testimony and the precedents; in *State v. Musick*, 101 Mo. 260, 270 (14 S. W. 212) (where the charge was an assault with malice aforethought, punishable by confinement in the penitentiary), that an instruction looking to a conviction for a lower grade, included in the offense charged, was proper where there was evidence justifying it; in *State v. Casford*, 76 Iowa, 332 (41 N. W. 32), that the defendant, so charged in an indictment that he could be convicted of rape, an assault to commit rape, or an assault and battery, was not prejudiced by the omission of the court to instruct the jury that he would be convicted of a simple assault, there being no evidence to authorize a verdict for the latter offense; in *Jones v. State*, 52 Ark. 346 (a murder case), that it was not error to refuse to charge as to a lower grade of offense, there being "no evidence of any crime less than murder in the first degree," and the defendant being, therefore, guilty of "murder in the first degree, or innocent;" in *McClelland v. Com.* (Ky.), 12 S. W. 148, and in *O'Brien v. Com.*, 89 Ky. 354 (murder cases), that an instruction as to manslaughter need not be given, unless there is evidence to justify it; in *State v. Estep*, 44 Kan. 575 (a case of murder of the first degree), that, there being no testimony tending to show that the defendant was guilty of manslaughter in either the first, second, or fourth degree, instructions as to those degrees should not have been given; and in *Robinson v. State*, 84 Ga. 674 (a case of assault with intent to murder), that the refusal to instruct the jury that the defendant could have been found guilty of an assault, or of assault and battery, was not error,

"for there was nothing in the evidence to justify the court in so instructing the jury."

We have said that, with few exceptions, the rules which obtain in civil cases in relation to the authority of the court to instruct the jury upon all matters of law arising upon the issues to be tried, are applicable in the trial of criminal cases. The most important of these exceptions is that it is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense charged, or of any criminal offense less than that charged. The grounds upon which this exception rests were well stated by Judge McCrary, Mr. Justice Miller concurring, in *U. S. v. Taylor*, 3 McCrary, 500, 505. It was there said: "In a civil case, the court may set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the court; but in a criminal case, if the verdict is one of acquittal, the court has no power to set it aside. It would be a useless form for a court to submit a civil case, involving only questions of law, to the consideration of a jury, where the verdict, when found, if not in accordance with the court's view of the law, would be set aside. The same result is accomplished by an instruction given in advance to find a verdict in accordance with the court's opinion of the law. But not so in criminal cases. A verdict of acquittal can not be set aside; and therefore, if the court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly."

We are of opinion that the court below did not err in saying to the jury that they could not, consistently with the law arising from the evidence, find the defendants guilty of manslaughter, or of any offense less than the one charged; that if the defendants were not guilty of the offense charged, the duty of the jury was to return a verdict of not guilty. No instruction was given that questioned the right of the jury to determine whether the witnesses were to be believed or not, nor whether the defendant was guilty or not guilty of the offense charged. On the contrary, the court was careful to say that the jury were the exclusive judges of the facts, and that they were to determine—applying to the facts the principles of law announced by the court—whether the evidence established the guilt or innocence of the defendants or of the charge set out in the indictment.

The trial was thus conducted upon the theory that it was the duty of the court to expound the law, and that of the jury to apply the law as thus declared to the facts as ascertained by them. In this separation of the functions of court and jury is found the chief value, as well as safety, of the jury system. Those functions can not be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights.

The main reason ordinarily assigned for a recognition of the right of the jury, in a criminal case, to take the law into their own hands, and to disregard the directions of the court in matters of law, is that the safety and liberty of the citizen will be thereby more certainly secured. That view was urged upon Mr. Justice Curtis. After stating that, if he conceived the reason assigned to be well founded, he would pause long before denying the existence of the power claimed, he said that a good deal of reflection had convinced him that the argument was the other way. He wisely observed that: "As long as the judges of the United States are obliged to express their opinions publicly, to give their reasons for them when called upon in the usual mode, and to stand responsible for them, not only to public opinion, but to a court of impeachment, I can apprehend very little danger of the laws being wrested to purposes of injustice. But, on the other hand, I do consider that this power and corresponding duty of the court authoritatively to declare the law is one of the highest safeguards of the citizen.

The sole end of courts of justice is to enforce the laws uniformly and impartially without respect of persons or times or the opinions of men. To enforce popular laws is easy. But when an unpopular cause is a just cause; when a law, unpopular in some locality, is to be enforced, there then comes the strain upon the administration of justice; and few unprejudiced men would hesitate as to where that strain would be most firmly borne." *U. S. v. Morris*, 1 Curt. 62, 63; Fed. Cas. No. 15,815.

The questions above referred to are the only ones that need be considered on this writ of error.

Mr. Justice JACKSON participated in the decision of this case, and concurs in the views herein expressed.

The judgment of the circuit court is affirmed as to Hansen,

but is reversed as to Sparf, with directions for a new trial as to him.

· Mr. Justice BREWER, dissenting. ·

I concur in the views expressed in the opinion of the court as to the separate functions of court and jury, and in the judgment of affirmance against Hansen; but I do not concur in holding that the trial court erred in admitting evidence of confessions, or in the judgment of reversal as to Sparf.

The facts, briefly stated, are these: There was a single indictment, charging the defendants jointly with the crime of murder. There was a single case on trial, a case in which the government was the party on one side and the two defendants the party on the other. These two defendants were represented by the same counsel. Three witnesses testified to confessions of Hansen. Counsel for defendants objected to each of these confessions. These objections were in the same form. They purported to be for the defendants jointly, and not separately for each. Two of the confessions were given in the presence of Sparf, and in admitting them, it is not pretended that there was any error. One was made in the absence of Sparf, and it is held that the court erred in overruling the objection to it. The objection was that the testimony offered was "irrelevant, immaterial, and incompetent, and upon the ground that any statement made by Hansen was not, and could not be, voluntary." It will be noticed that this objection was both general and special; the special ground, that which would naturally arrest the attention of the court, being that the confession was not voluntary. This ground of objection, it is admitted, was not well taken. If there was any error it was in overruling the general objection that the testimony was irrelevant, immaterial, and incompetent. But it is conceded that this confession was material, relevant, and competent, was properly admitted in evidence on the single trial then pending, and properly heard by the jury. The real burden of complaint is that, when the court admitted the testimony, it ought to have instructed the jury that it was evidence only against Hansen, and not against Sparf. But, in common fairness, ought not the attention of the court to have been called to the difference, and a ruling had upon that difference? Can not parties present a joint objection to testimony, and rest

their case upon such objection? Is it the duty of the court to consider a matter which is not called to its attention, and make a ruling which it is not asked to make? Is it not the duty of the court to be impartial between the government and the defendant, and decide simply the questions which each party presents? Is it its duty to watch over the interests of either party, and to put into the mouth of counsel an objection which he does not make? To my mind, such a doctrine is both novel and dangerous. I do not question the proposition that a confession made by one of two defendants in the absence of the other is to be considered by the jury only as against the one making it, and I admit that, if a separate objection had been made by Sparf, the court would have been called upon to formally sustain such objection, and instruct the jury that such testimony was to be considered by them only as against Hansen. If an instruction had been asked, as is the proper way, the attention of the court would have been directed to the matter, and an adverse ruling would have rightly presented the error which is now relied upon. But I need not refer to the oft-repeated decisions of this court, that there is no error in failing to give an instruction which is not asked, unless it be one of those which a statute in terms requires the court to give, and there is no pretense of any such statute. *Lewis v. Lee Co.*, 66 Ala. 480, 489, was decided in accordance with the views which I have expressed. The court in that case say:

"The witness Frazier's testimony, as to his conversation with the defendant Lewis regarding the condition of his accounts as county treasurer, was properly admitted in evidence. It was certainly good as an admission against him, and could not be excluded because not admissible against the sureties, who were his defendants in the action. The practice on this point is well settled in this State that the only remedy of a co-defendant in such a case is to request a charge from the court to the jury, limiting the operation of the evidence, so as to confine its influence only to the defendant against whom it is admissible."

So in *State v. Brite*, 73 N. C. 26, 28, a similar ruling was made, the court saying:

"The defendant's first exception is that his honor allowed Culpepper, a co-defendant, to introduce witnesses to prove his

(Brite's) declarations while in jail, which tended to exonerate Culpepper."

"While these declarations are not evidence, either for or against Culpepper, being, as to him, *res inter alios acta*, and made by one not under oath and subject to cross-examination, yet they are clearly admissible against Brite, and it makes no difference whether they were called forth by the State, or by Culpepper without objection, or rather with the sanction of the State."

I have been able to find no case laying down a contrary doctrine. In *Insurance Co. v. Hillmon*, 145 U. S. 285, each defendant separately for itself presented the objection, and each, therefore, had the right to avail itself of the ruling made by the court. Indeed, I think this will be found to be the first case in which it has been held that, while the court properly allowed testimony to go to the jury on the trial of a case, the judgment has been reversed because it failed to call the attention of the jury to the bearing of that evidence upon the different parties when such parties never asked the court to so instruct the jury.

I am authorized to say that Mr. Justice Brown concurs in these views.

(Jan. 21, 1895.)

Mr. Justice GRAY, with whom concurred Mr. Justice SHIRAS, dissenting.

Mr. Justice Shiras and myself concur in so much of the opinion of the majority of the court as awards a new trial to one of the defendants by reason of the admission in evidence against him of confessions made in his absence by the other.

But from the greater part of that opinion, and from the affirmation of the conviction of the other defendant, we are compelled to dissent, because, in our judgment, the case, involving the question of life or death to the prisoners, was not submitted to the decision of the jury as required by the Constitution and laws of the United States.

The two defendants, Herman Sparf and Hans Hansen, together with Thomas St. Clair, seamen on board the brig Hesper, an American vessel, were indicted for the murder of Maurice Fitzgerald, the second mate, on the high seas, on January 13, 1893, by striking him with a weapon, and by throwing him overboard and drowning him.

St. Clair was separately tried, convicted and sentenced, and his conviction was affirmed by this court at the last term. 154 U. S. 134.

At the trial of Sparf and Hansen, there was no direct testimony of any eye witness to the killing, or to any assault or affray. There was evidence that at ten o'clock in the evening of the day in question the second mate was at the wheel, in charge of the starboard watch, consisting of St. Clair, Sparf, Hansen and another seamen; and that, when the watch was changed at midnight, the second mate could not be found, and there was much blood on the deck, as well as a bloody broomstick and a wooden bludgeon. The rest of the evidence consisted of testimony of other seamen to acts and statements of each defendant and of St. Clair, before and after the disappearance of the second mate, tending to prove a conspiracy to kill him; and to subsequent confessions of Hansen, tending to show that the killing was premeditated.

The judge, in his charge to the jury, gave the following instructions: "The indictment is based upon section 5339 of the revised statutes, which provides, among other things, that 'every person who commits murder' 'upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, or who upon any of such waters maliciously strikes, stabs, wounds, poisons or shoots at any other person, of which striking, stabbing, wounding, poisoning or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death.'"

"Murder is the unlawful killing of a human being in the peace of the State, with malice aforethought, express or implied." "Express malice" was defined as "deliberate, premeditation and design, formed in advance, to kill or to do bodily harm, the premeditation and design being implied from external circumstances capable of proof, such as lying in wait, antecedent threats, and concerted schemes against a victim;" and "implied malice" as "an inference of the law from any deliberate and cruel act committed by one person against another," "that is, malice is inferred when one kills another without provocation, or when the provocation is not great." "Man-slaughter is the unlawful killing of a human being without

malice, either express or implied. I do not consider it necessary, gentlemen, to explain it further; for, if a felonious homicide has been committed—of which you are to be the judges from the proof—there is nothing in this case to reduce it below the grade of murder.” “Every person present at a murder, willingly aiding or abetting its perpetration, is guilty of murder, and may be indicted and convicted as principal in the first degree.” “It is not my purpose, nor is it my function, to assume any fact to be proven, nor to suggest to you that any fact has been proven. You are the exclusive judges of the facts.”

The defendants requested the judge to instruct the jury that “under the indictment in this case the defendants may be convicted of murder or manslaughter or of an attempt to commit murder or manslaughter; and if, after a full and careful consideration of all the evidence before you, you believe beyond a reasonable doubt that the defendants are guilty either of manslaughter, or of an assault with intent to commit murder or manslaughter, you should so find your verdict.” The judge refused to give this instruction, and the defendants excepted to the refusal.

The jury, after deliberating on the case for some time, returned into court, and, being asked whether they had agreed upon a verdict, the foreman said that one of the jurors wished to be instructed upon certain points under the laws of the United States, as to murder upon the high seas. One of the jurors then said that he “would like to know, in regard to the interpretation of the laws of the United States in regard to manslaughter, as to whether the defendants can be found guilty of manslaughter, or that the defendants must be found guilty,” evidently meaning “of murder,” the whole offense charged in the indictment.

The judge then read again section 5339 of the Revised Statutes. The juror asked, “Are the two words ‘aiding’ or ‘abetting’ defined?” The judge replied: “The words ‘aiding or abetting’ are not defined. But I have instructed you as to the legal effect of aiding and abetting, and this you should accept as law. If I have made an error, there is a higher tribunal to correct it.” The juror said: “I am the spokesman for two of us. We desire to clearly understand the matter. It is a barrier in our mind to our determining the

matter. The question arising amongst us is as to aiding and abetting. Furthermore, as I understand, it must be one thing or the other. It must be guilty or not guilty." The judge replied: "Yes, under the instructions I have given you." The judge, then, after repeating the general definitions, as before given, of murder and of manslaughter, said: "If a felonious homicide has been committed by either of the defendants, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder;" and in answer to further questions of the juror repeated this again and again, and said: "In a proper case, it may be murder, or it may be manslaughter, but in this case it can not properly be manslaughter." The defendants excepted to these instructions. And finally, in answer to the juror's direct question, "Then there is no other verdict we can bring in, except guilty or not guilty?" the judge said: "In a proper case, a verdict for manslaughter may be rendered, as the district attorney has stated; and even in this case you have the physical power to do so; but, as one of the tribunals of the country, a jury is expected to be governed by law, and the law it should receive from the court." The juror then said: "There has been a misunderstanding amongst us. Now, it is clearly interpreted to us, and, no doubt, we can now agree on certain facts." Thereupon a verdict of guilty of murder was returned against both defendants, and they were sentenced to death, and sued out this writ of error.

The judge, by instructing the jury that they were bound to accept the law, as given to them by the court, denied their right to decide the law. And by instructing them that, if a felonious homicide by the defendants was proved, there was nothing in the case to reduce it below the grade of murder, and they could not properly find it to be manslaughter, and by declining to submit to them the question, whether the defendants were guilty of manslaughter only, he denied their right to decide the fact. The colloquy between the judge and the jurors, when they came in for further instructions, clearly shows that the jury, after deliberating upon the case, were in doubt whether the crime which the defendants had committed was murder or manslaughter; and that it was solely by reason of these instructions of the judge that they returned a verdict of the higher crime.

It is our deep and settled conviction, confirmed by a re-examination of the authorities under the responsibility of taking part in the consideration and decision of the capital case now before the court, that the jury, upon the general issue of guilty or not guilty in a criminal case, have the right as well as the power, to decide, according to their own judgment and consciences, all questions, whether of law or of fact, involved in that issue.

[The learned justice enters into a very able and exhaustive review of the foundation, expansion and growth of the right of trial by jury in criminal cases, and by a most logical and fanciful argument covering some 73 pages of the report maintains that it is the right of the jury, according to their own judgment and consciences, to decide questions of law as well as of fact. It is quite evident that the polished, cultured and learned justice does not preside at trials in the Criminal Court of Cook county where he would be regaled daily with the harangues of learned counsel, extolling the beneficence and wisdom of the law which made jurors judges of the law as well as the facts.

The Supreme Court of Vermont, in the recent case of *State v. Burpee*, 9 Am. Cr. R., 536, declared a similar statute of that State unconstitutional.

That part of the opinion which denies to the jury the right to say whether accused was guilty of murder or manslaughter, in my judgment, is not good law. It is a question for the jury under proper instructions.—Ed.]

NOTE.—*Confessions inadmissible unless voluntary.*—The Supreme Court of Alabama, in the recent case of *Bradford v. State*, 104 Ala. 68, say: "The rule is well recognized that confessions in criminal cases are *prima facie* inadmissible, and, unless waived, will not be received until the court, proceeding with great care and caution, is made satisfied by evidence that they were entirely voluntary. See the strong language used in following cases: *Bonner v. State*, 55 Ala. 242; *Young v. State*, 68 Ala. 569; *Brister v. State*, 26 Ala. 107; *Owen v. State*, 78 Ala. 425; *Wilson v. State*, 84 Ala. 426, 4 South. 383; *Amos v. State*, 83 Ala. 1, 3 South. 749. In the case last cited there was a mere general objection to the evidence of the confessions, specifying no ground; and this court reversed the judgment, for error in overruling it, because there had been no proper predicate laid for the introduction of confessions. In the present case we have seen the defendant objected on the grounds, with others, that the testimony was incompetent and illegal. When this was done, we hold the court ought to have required satisfactory proof, according to the spirit and intent of the above-named decisions, that the confessions were voluntarily made, before admitting them, and erred in not doing so."

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Same.—It appeared that defendant, who bore an assumed name when arrested, confessed when the sheriff confronted him with his true name, and afterward told the sheriff that he should plead guilty, and that the sheriff replied that in that case he would speak to the judge and get defendant off as easy as possible. *Held*, that a charge that confessions must be made voluntarily, and that if defendant made them under undue influence they could not be considered, was sufficiently favorable to defendant. *People v. Warner*, 104 Mich. 837.

Sufficient to convict.—Where, in a murder case, the only evidence of the circumstances of the killing is contained in defendant's alleged confession that he entered deceased's building to commit larceny, deceased got between him and the door, and "I watched my chance, and jumped on the old man, and wrenched his pistol, and the old man hollered 'Murder.' Then I shot him through the body. The old man said: 'You have got me.' I aimed to shoot him and this must have been when I shot him in the neck. And I shot him again," it is proper to instruct either to acquit or find defendant guilty of murder in the first degree, the second and third shots being the fatal ones, and the confession showing that they were fired with deliberation and premeditation. *State v. Covington*, 117 N. C. 834.

Presence of mob renders confession inadmissible.—Defendant, on being arrested by a mob for murder, was first taken into the woods, where he was told by one that it would be best for him to confess, although the leader of the mob stated that they did not want a confession unless it was voluntary, whereupon defendant confessed; then, in order to compel him to tell where the weapon was that he used, the mob threatened to hang him. *Held*, that none of the confession was admissible. *Williams v. State*, 105 Ala. 96.

Foundation to be laid—Harmless error.—One who lived with defendant testified for the State that on the night of the murder, defendant, on coming home, told witness that he killed deceased, and warned witness to keep silence. *Held*, that error in admitting the confession without foundation having been laid therefor was harmless, since it appeared by the testimony that the confession was voluntary. *People v. Kamaunu*, 110 Cal. 155.

Conviction may be had upon confession of accused.—The *corpus delicti* being established independently of the admissions or confessions of the accused, then admissions or confessions, freely and voluntarily made, may be sufficient on which to convict. *Gore v. People*, 163 Ill. 259.

Proof of confession of crimes other than that charged—When not error.—Confession by the accused of a crime other than that charged in the indictment, while not admissible as a substantive fact, may, when not separable from a competent confession, go to the jury, under cautionary directions from the court. *Id.*

STATE v. DYER ET AL.

(67 Vt. 690.)

CONSPIRACY: To prevent non-union workman from obtaining employment—Prosecution by information—Evidence—Misnomer.

1. R. L., § 1618, Vermont, provides for the prosecution by information of all crimes except capital and those punishable by imprisonment in the

State's prison more than seven years; section 4365 provides that imprisonment declared by law as punishment for any offense not specified to be in the State prison, shall be in the house of correction; section 689 adopts so much of the common law as is applicable to the local situation. *Held* that, as, under the common law, conspiracy is a misdemeanor, the prosecution by information was proper.

2. An information charging that the conspiracy was to prevent a certain person "from obtaining work or employment or continuing in said work and employment" with a certain corporation, "or in any other shops or works," is not bad, as charging offenses in the alternative.
3. On a prosecution of members of a union for conspiracy to drive a mechanic out of his employment because he would not join a union, conversations between certain of the conspirators and one with whom the mechanic, after being driven from his employment, had engaged to work, taking place a week after the mechanic had been driven from his first employment, are admissible which connects such conspirators with the conspiracy.
4. Admissions by one of the conspirators, made to a sheriff who held him in arrest, as to his connection with the union, and his actions in regard to the mechanic conspired against, are, when restricted to the incrimination of himself, properly admitted in evidence.
5. Where, in such a case, there was evidence that all the persons charged were members of the union: that the mechanic was compelled by them, as members of such union, to quit his employment; that one of the accused was secretary, and recorded the minutes of an executive meeting at which a report of the mechanic's case was made, and was at such meeting appointed, and subsequently acted, as one of a committee to investigate the trouble, *held*, that the secretary was a conspirator.

Exceptions from Washington County Court; Munson, Judge.
Josiah B. Dyer and others were convicted of conspiracy,
and except. Exceptions overruled.

The material part of the information was as follows: First count: "That Josiah B. Dyer and Thomas Quinlan, of Barre, in the county of Washington, and Frank Morrill, Patrick Morrison, Peter Hernon, E. D. Sherburne, H. P. Sylvester, Thomas Hocking and Alex. Cruickshank, of Montpelier, in the county of Washington, with divers evil-disposed persons, to the state's attorney unknown, on the 22d day of November, in the year of our Lord one thousand eight hundred and eighty-nine, at Montpelier, in the county of Washington, did unlawfully combine, conspire, confederate and agree together to prevent, hinder and deter, by violence, threats and intimidation, one Jacob McClure, then and there being a stonecutter by trade and occupation, in the employment of the Wetmore & Morse Granite Company, of Montpelier aforesaid, a corpo-

ration then and there being and existing by law, from obtaining work or employment, or continuing in his said work and employment, at his said trade or occupation, in the said shops of the said Wetmore & Morse Granite Company, of Montpelier aforesaid, or in any other shops or works for the cutting or manufacture of granite work, with the malicious and unlawful intent of them, the said Josiah B. Dyer, Thomas Quinlan, Frank Morrill, Patrick Morrison, Peter Hernon, E. D. Sherburne, H. P. Sylvester, Thomas Hocking and Alex. Cruickshank by said violence, threats and intimidation, to prevent the said Jacob McClure from obtaining work or employment at his said trade and occupation in the shops and works of the said Wetmore & Morse Granite Company, of Montpelier, aforesaid, or in any other shops or works for the cutting or manufacture of granite work."

Second count: "That Josiah B. Dyer, Thomas Quinlan, of Barre, in the county of Washington, and Frank Morrill, Patrick Morrison, Peter Hernon, E. D. Sherburne, H. P. Sylvester, Thomas Hocking, and Alex. Cruickshank, of Montpelier, in the county of Washington, on the 22d day of November, in the year of our Lord one thousand eight hundred and eighty-nine, at Montpelier, in the county of Washington, being granite cutters by occupation, not being content to allow other granite cutters to pursue their avocations and employment wherever they wished, and on whatever terms might be agreed upon between said other granite cutters and their employers, but contriving and unjustly and unlawfully intending to destroy the effect of free competition in the price and value of labor, to coerce and constrain said other granite cutters, and to compel said other granite cutters to join and become members of a branch of the National Stonecutters' Union, an organization then and there organized and existing at Montpelier aforesaid, and to prevent said other granite cutters from obtaining work at their said trade and occupation, did on the 22d day of November, A. D. 1889, at Montpelier aforesaid, with force and arms, combine, conspire, confederate, and unlawfully agree together, and did enter into an organization and compact whereby it was, among other things, provided, that no person or persons not members of the said branch of the said stonecutters' union should be allowed to work in the shops of the Wetmore & Morse Granite Company of Mont-

pelier aforesaid, or in any other shop or works for the cutting of granite or manufacturing of granite work. And the said Josiah B. Dyer, Thomas Quinlan, Frank Morrill, Patrick Morrison, Peter Hernon, E. D. Sherburne, H. P. Sylvester, Thomas Hocking, and Alex. Cruickshank, in the pursuance of the said unlawful conspiracy, combination, and compact, with the intent by violence, threats, and intimidation to prevent one Jacob McClure, then and there being a stonecutter by trade and occupation, from obtaining or continuing work at his occupation of granite cutting in the said shops or works of the said Wetmore & Morse Granite Company, of Montpelier aforesaid, or in any other shops or works for the cutting of granite, did then and there threaten and say to Jacob McClure, who was then and there a laborer and workman as a granite cutter in the shops and works of the said Wetmore & Morse Granite Company, of Montpelier aforesaid, that if he, the said Jacob McClure, did not join and become a member of a branch of the National Stonecutters' Union, then and there organized and existing at said Montpelier, that they, the said Josiah B. Dyer, Thomas Quinlan, Frank Morrill, Patrick Morrison, Peter Hernon, E. D. Sherburne, H. P. Sylvester, Thomas Hocking, and Alex. Cruickshank, and others unknown to the state's attorney, would organize a strike against the said Jacob McClure in the shops and works of the said Wetmore & Morse Granite Company, of Montpelier aforesaid, and would prevent him, the said Jacob McClure, from obtaining work at his said trade of stonecutting in said shops of the said Wetmore & Morse Granite Company, of Montpelier aforesaid, or in any other shops or works where granite cutting or manufacturing was carried on. And the said Jacob McClure refusing then and there to become a member of the said branch of the National Stonecutters' Union, the said Josiah B. Dyer, Thomas Quinlan, Frank Morrill, Patrick Morrison, Peter Hernon, E. D. Sherburne, H. P. Sylvester, Thomas Hocking, and Alex. Cruickshank did then and there threaten and say to the said Wetmore & Morse Granite Company, of Montpelier, aforesaid, that unless the said Jacob McClure was turned away from his employment as a granite cutter in the said shops and works of the said Wetmore & Morse Granite Company, of Montpelier, aforesaid, they, the said Josiah B. Dyer, Thomas Quinlan, Frank Morrill, Patrick Morrison, Peter Hernon, E. D. Sher-

burne, H. P. Sylvester, Thomas Hocking, and Alex. Cruickshank would organize a strike against the said Jacob McClure, and would prevent the said Wetmore & Morse Granite Company, of Montpelier, aforesaid, from obtaining or employing any workmen or laborers in their said shops or works. And by means of said sayings and threats the said Josiah B. Dyer, Thomas Quinlan, Frank Morrill, Patrick Morrison, Peter Hernon, E. D. Sherburne, H. P. Sylvester, Thomas Hocking, and Alex. Cruickshank did then and there affright, drive away, and prevent the said Jacob McClure from obtaining and continuing his employment and labor in the said shops or works of the said Wetmore & Morse Granite Company, of Montpelier aforesaid. And so the said state's attorney, on his oath aforesaid, says that the said Josiah B. Dyer, Thomas Quinlan, Frank Morrill, Patrick Morrison, Peter Hernon, E. D. Sherburne, H. P. Sylvester, Thomas Hocking, and Alex. Cruickshank, did then and there, in manner aforesaid, by threats, intimidation, and the unlawful and grievous conspiracy aforesaid carried into execution as aforesaid, prevent the said Jacob McClure from obtaining and prosecuting his said employment and work of stonecutting in the said shops and works of the said Wetmore & Morse Granite Company, of Montpelier, aforesaid, or in any other shop or works for the manufacture or cutting of granite." The other points decided, sufficiently appear in the opinion.

J. P. Lamson, for the State.

Dillingham, Huse & Howland, Z. C. Stanton, John H. Senter and *W. H. Lord*, for respondents.

TYLER, J. It is contended that the information is insufficient. Neither count is under section 4226, R. L. That section provides that "a person who threatens violence or injury to another person with intent to prevent his employment in a mill, manufactory, shop, quarry," etc., shall be punished, etc. It evidently is not directed to cases where two or more persons act in concert, as in sections 4236 and 4237. Nor is either count under section 4227, which is directed against persons who, by threats, intimidation or force, drive men from their employment, with intent to prevent the prosecution of work in such mill, etc. The second count avers that the

respondents threatened the Wetmore & Morse Granite Company that they would prevent its obtaining workmen if it did not discharge McClure, but does not aver that the threats were made with such an intent as is necessary to bring a case within section 4227. Conspiracy is an offense at common law. Bishop says it is connected with every form of wrong-doing cognizable by the law; that it is the corrupt agreeing together of two or more persons to do by concerted action something unlawful, either as a means or an end. The unlawful act must either be such as would be indictable performed by one alone, or, not being such, be of a nature particularly adapted to injure the public, or some individual, by reason of the combination. 2 Bish. Cr. Proc., § 166; 2 Bish. Cr. Law, § 171. Powers, J., in *State v. Stewart*, 59 Vt. 273: "The reports, English and American, are full of illustrations of the doctrine that a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, whether such purpose be illegal at common law or by statute; or to effect a legal purpose by illegal means, whether such means be illegal at common law or by statute—is a common law conspiracy. Such combinations are equally illegal whether they promote objects or adopt means that are *per se* indictable, or promote objects or adopt means that are *per se* oppressive, immoral or wrongfully prejudicial to the rights of others," and cites, among other authorities, 2 Russ. Crimes, "that all conspiracies whatever, wrongfully to prejudice a third person, are highly criminal at common law." See notes to this case in 59 Am. Rep. 710; *Ree v. Mawbrey*, 6 Term R. 636. The counts of this information are in substantial compliance with the common law precedents. 2 Bish. Cr. Proc., § 18. They are in all material respects like those in the indictment in *State v. Stewart et als.*, which were held sufficient as setting out a conspiracy at common law.

Our statute (R. L., § 689) adopts so much of the common law of England as is applicable to the local situation and circumstances and is not repugnant to our constitution and laws. The main question that arises upon this branch of the case is whether the prosecution could be by information, or must be by indictment. The respondents' counsel argue that conspiracy can be charged only by indictment, as conviction thereof was followed at common law by villainous judgment. The ancient punishment of conspiracy was that called "villainous

judgment," which was that the offenders should lose the freedom or franchise of the law, so that they should be disqualified as jurors or witnesses, and have their lands and goods seized by the crown. 3 Chit. Cr. Law, 1144. But the author says there has been no instance of the infliction of this punishment since the time of Edward III., and that it was punishable, like any other misdemeanor, at the discretion of the court. *Ree v. Spragg et al.*, 2 Burr., 997. In 2 Russ. Crimes, 574, it is said that this kind of judgment had become obsolete, not having been pronounced for some ages. In 2 Bish. Cr. Law, § 240, conspiracy is declared to be a misdemeanor, even in those cases where its object is the commission of a felony. R. L., § 1618, provides that state's attorneys may prosecute by information all crimes except capital and those punishable by imprisonment in the state prison more than seven years. *State v. Haley*, 52 Vt. 476. The first count charges a conspiracy to prevent McClure's obtaining employment; the second, the actual accomplishment of the purpose; both charge a conspiracy to do acts unlawful at common law, by means unlawful under the statute. *State v. Stewart et als.*, *supra*. In section 940, Bish. Cr. Law, it is said that the ordinary and appropriate common law punishment for a misdemeanor is fine and imprisonment, or either, in the discretion of the court; that it is inflicted in all cases in which the law has not provided some other specific penalty. Section 4365, R. L., provides that where an offense is declared by law to be punishable by imprisonment, and it is not specified that such imprisonment shall be in the state prison, it shall be construed to mean that it shall be in the house of correction. The words "declared by law" do not necessarily or reasonably mean statute law only, but include the common law whenever it defines an offense and makes it punishable by imprisonment. In this view the claim that prosecution can only be by indictment, is not maintained.

It is a general rule that the facts and circumstances which constitute the crime must be stated with such certainty and precision that the accused may judge whether they constitute an indictable offense or not, in order that he may demur or plead to the indictment accordingly, that he may determine the kind of offense they constitute, and prepare his defense; and that the court may know what judgment to pronounce

upon conviction, as Lord Kenyon said in *Rex v. Holland*, 5 Term R. 607, that the party accused may be apprised of the charge against which he is to defend himself; that the court may know what judgment shall be pronounced according to law; and that posterity may know what law is to be derived from the record. It is elementary that an indictment, information, or complaint must not charge the accused disjunctively, so as to leave it uncertain what is relied on as the accusation against him. Thus, an indictment which alleged that the defendant made a forcible entry into two closes of meadow or pasture was held bad. *Speart's Case*, 2 Rolle, Abr. 81. So an information which alleged that the defendant sold beer or ale without an excise license (*The King v. North*, 6 Dowl. & R. 143), and where one was charged with committing a certain nuisance, or causing it to be committed (*Rex v. Stoughton*, 2 Strange, 900). In *Rex v. Stocker*, 1 Salk. 371, an indictment 'for forging or causing to be forged, etc., was held ill. But Lord Mansfield said in *Rex v. Middlehurst*, 1 Burrows, 400: "Upon indictments, it has been so determined 'that an alternative charge is not good' (as 'forged or caused to be forged'), though one only need be proved if laid conjunctively (as 'forged and caused to be forged'). But I do not see the reason of it. The substance is exactly the same; the defendant must come prepared against both; and it makes no difference to him in any respect." A forcible illustration of a disjunctive charge is *Ex parte Pain*, 5 Barn. & C. 251, 11 E. C. L. 450. The indictment was under a statute which prohibited three kinds of casks from being found attached to certain vessels in the Irish or British Channels in certain circumstances: (1) Those of the kind used for smuggling spirits; (2) those intended to be so used; (3) those fit or adapted for that purpose. The allegation was that said vessel had attached 20 casks, "of the sort and description used or intended to be used for the smuggling of spirits." Held that it was not alleged that the casks answered any one of the three descriptions, but one or another of them, and that the allegation, being in the alternative, was defective. *Rex v. Morley*, 1 Younge & J. 221, was under a statute which enacted that no foreign silks or velvets should be imported or brought into Great Britain upon penalty, etc. The averment in the count upon which the trial was had was "that the defendant imported or caused to be imported," etc.

This was held bad for uncertainty. Several similar cases where the indictments were held ill are referred to in the opinion; as *Winfield v. Jefferys*, 1 Ld. Raym. 284, "for selling live cattle, or causing them to be sold;" *Attorney General v. Farr*, 4 Price, 122, where the defendant was charged "with having been assisting or otherwise concerned in unshipping smuggled goods;" *Rea v. Stocker*, 5 Mod. 137, where the charge was "for making and fabricating, or causing to be made and fabricated, a bill of lading." It was said by the court in that case that "it is true, in a strict sense, that he who causeth a forgery to be done is a forger himself, but then it ought to be so laid in the indictment;" that one was the proper act of the party, the other not, and the circumstances might require a distinct consideration as to the fine. In *Davy v. Baker*, 4 Burrows, 2471, the declaration was that the defendant received a gift or reward, and was held bad, it not stating of what the gift or reward consisted. In all these cases there is uncertainty in respect to the act with which the respondents are charged. Generally the charge is in the alternative, as that the respondent did one thing or another thing, or that he did a certain thing or procured it to be done. In *Com. v. Gray*, 2 Gray, 501, the complaint was that the defendant, without license, etc., did sell spirituous or intoxicating liquor to one White: Held that, as the complaint left it uncertain whether the defendant was charged with having sold spirituous liquor, or intoxicating liquor not spirituous, it was insufficient to sustain a judgment. But where a person was charged with having in his possession ten counterfeit bank bills or promissory notes, with intent, etc., the indictment was held sufficient upon the ground that "promissory note" was used merely as explanatory of "bank bill," and meant the same thing. *Brown v. Com.*, 8 Mass. 59. In *State v. Gilbert*, 13 Vt. 647, an information was held sufficient which alleged that the defendant feloniously stole, took and carried away a mare of a bay or brown color, the court holding that it was unnecessary to describe the color, and that the colors named were the same. In this case the material averments in the first count—that the respondents entered into a conspiracy together, that the conspiracy was against McClure, that the purpose was to be accomplished by threats, intimidation, and violence—are single and definite. But it is contended that the averment that the con-

spiracy was to prevent McClure "from obtaining work or employment or continuing in his said work and employment" is alternative and bad. As it is alleged that McClure was in the employment of that corporation when the conspiracy was formed, "obtaining" employment in its shops and "continuing" employment there are synonymous terms. The two words convey a conjunctive and not a disjunctive meaning. Any other signification than that the conspiracy was to prevent McClure from having employment in those shops would be forced and unnatural.

With the addition "or in any other shops or works," etc., the charge is of a conspiracy to drive McClure out of his employment as a stonecutter. The conspiracy is the gist of the offense here charged. *Com. v. Judd*, 2 Mass. 337; *Com. v. Shedd*, 7 Cush. 514; *People v. Muther*, 4 Wend. 259. The same reasoning applies to the second count, which contains the further averments of threats to McClure to drive him out of employment unless he would join the respondents' branch of the union; of threats to the corporation that unless it discharged him from its service they would prevent its obtaining any workmen; and that it did drive McClure out of the employment of the corporation. Both counts contain unnecessary words, but the material allegations are not uncertain. While the rule requires that every offense shall be laid with reasonable certainty—"certainty to a certain intent in general"—both counts apprised the respondents with sufficient certainty of the offense of which they were accused. Greater strictness than this "would tend to render the law nugatory and ineffectual, and destroy or evade the very end of it."

The respondents' counsel contend that the testimony of Eagan and McDonald was improperly admitted. It consisted of a conversation had between those witnesses and Dyer and Morrison, two of the respondents, on the Sunday next after the acts complained of. The evidence of the State had tended to show that the respondents had driven McClure from the employment of the Wetmore & Morse Granite Company, and that on Saturday of that week he engaged to do some granite carving for Eagan; that on Sunday, Dyer, McDonald and Morrison were at Eagan's shop to inquire about the agreement between Eagan and McClure; that Eagan told Dyer and Morrison of the agreement he had made; that McClure had

afterward told him of the trouble he had had at the Wetmore & Morse shops; that he had made inquiry and ascertained that there would be trouble if McClure undertook to cut stone for him, and that he had canceled the agreement. Eagan then testified to a conversation that followed as to the reason why McClure had not joined the union, and why he had been forced into his then present position. This evidence could not have been excluded, as it tended to show that Dyer and Morrison were connected with the alleged offense. We also think that the conversation was so closely connected with the main occurrence that it was not a mere narrative of a past event. It was concomitant with the principal act and so connected with it that it might be regarded as the result and consequence of the co-existing motives of all the respondents. 1 Greenl. Ev., § 110. The testimony of Hernon was only to the effect that at Eagan's request he made inquiry whether the retention of McClure by Eagan would make trouble, and that he reported to the latter the result, which was testified to by Eagan. It amounted merely to this, that Hernon was the means through which Eagan ascertained a certain fact. It was immaterial how Eagan ascertained the fact, or whether he ascertained it at all, or whether he retained or dismissed McClure from his service. The point was that Dyer and Morrison were at Eagan's making inquiry about his employment of a non-union man, and in the same connection discussing the subject of McClure's dismissal from the Wetmore & Morse shops.

The State was entitled to the testimony of Deputy Sheriff Camp. It tended to show that while Morrison was under arrest he made certain admissions to the officer about his connection with the union, the office he held in it, and his action in respect to McClure. It is true that he claimed to have acted under the instruction of other respondents, and that he was not in fault; but so far as his statements tended to inculcate himself they were admissible. So far as they tended to criminate others, the jury were carefully instructed as follows: "But the declarations of one of the respondents, not made in the prosecution of the undertaking, but after its completion, are not evidence against the others. For instance, the testimony of the witness Camp as to what was said to him by Morrison, is to be considered only as affecting Morrison, and is not evidence against

the others." This was a correct instruction in respect to the use they were to make of this evidence.

At the conclusion of the testimony the respondents' counsel made the following motion: "We make a formal motion asking for a direction from the court directing an acquittal of each one of the respondents upon the ground that there is no evidence to justify their conviction under either of the counts in the information," which motion was overruled. It is now claimed that it should have been sustained on two grounds: (1) That the real name of the organization to which the respondents belonged was the Granite Cutters' National Union, whereas it was called in the second count in the information the National Stonecutters' Union; (2) that there was no evidence tending to connect Dyer with a conspiracy against McClure, and that he should have been discharged. The motion could not have been sustained on the first ground because it failed to call the attention of the court to the misnomer. The court was not bound to have knowledge of the name of the organization. It is well settled that a motion for a verdict should state the precise grounds on which it is based, or the court may well disregard it. *State v. Nulty*, 57 Vt. 543. The defect was not of substance, and the variance was so immaterial that it might have been cured by amendment, had the attention of the court been directed to it.

It is first pointed out in this court, which is equivalent to filing the motion here. The other question must be determined by the evidence. That introduced by the State tended to show the following facts: That there was an organization called the Granite Cutters' National Union, with a branch in every place where any considerable number of granite cutters were at work; that there were branches at Barre and Montpelier. The organization had a constitution and by-laws, a president, secretary, and an executive committee, which also had a secretary. The executive committee held meetings at regular times, and kept a record of its doings. Each branch also had its officers, rules and regulations, and held meetings. All the respondents were members of the organization. McDonald was president, Dyer was secretary—one of the executive committee and its secretary; and his office in Barre, where a paper was published, was the headquarters of the organization. Morrison was an officer called "shop steward,"

whose duty was to keep a record of all non-union men on works where he was employed, and present their names at the branch meeting. It was also his duty to notify every non-union man to report at such meeting and take the obligations. If he refused, action would be taken against him which would result in his becoming a member or being obliged to leave his employment. The person for whom the non-union man worked would also be notified, and action be taken against him if he retained such a man in his service. Morrill, Morrison and Sherburne worked at the Wetmore & Morse shops. They belonged to the Montpelier branch and attended its meetings, and Morrill sometimes presided. About October 15, 1889, McClure, who was a granite cutter, and non-union, went to work in the Wetmore & Morse shops, and continued to work there till November 21st, boarding at the same place with Morrill and Sherburne. Morrison soon called on him and informed him that he should have to report him. McClure gave reasons for not joining. In about a week Morrison again called on him, told him he had laid his case before the meeting of the branch, which had directed him to notify McClure that he must report at their hall at the next meeting, on November 20th, and that if he failed to report he would make him trouble. McClure wrote a letter for Morrison to read at the meeting, in which he stated reasons for not joining, and offered to pay the same amount as if he were a member. On November 21st, Morrison notified McClure that his case had been considered at the meeting, and that it had been unanimously voted "that he had got to join the union that day at 12 o'clock;" that Morrill, as president *pro tempore*, would administer the obligation or oath to him; and that if he failed to report, action would be taken against him, and a strike organized against him. About 11 o'clock that day Morrison again called on him and gave him a final choice between taking the obligation or being driven from the works. On the same day Morrill and Sherburne told him, in substance, that he would have to join or quit work. There were other conversations between Morrison, Morrill, Sherburne and McClure, to the effect that unless he joined, they would take action against him; that they would strike and demand his discharge, and they would not allow him to work. McClure refused to join, and on November 22d quit his employment. The State's evidence

further tended to show that Morrison procured a meeting of the executive committee to be held at Barre on Saturday evening, November 23d; that it was held to investigate McClure's case; that Morrison made a statement of the trouble with the latter, of McClure's letter to the meeting, of the meeting held at noon of the 22d at the shops, and that while it was in session word came that McClure "had packed up and gone;" that Dyer was present at this meeting, and recorded its proceedings, and he and McDonald were appointed to go to Montpelier the next day to investigate; that they went accordingly, and had the interview with Eagan before referred to; also with the secretary of the Montpelier branch. The evidence did not tend to show that Dyer made any threats to, or had any communication with McClure, yet he was a prominent officer in an organization whose purpose was to compel all stonecutters to become members or leave their employment. His presence as such officer at the meeting of November 23d; his acceptance of the appointment, with McDonald, to visit Montpelier the next day and "investigate;" his visit on Sunday and interviews with Eagan, Rice and others—were acts following so closely upon the action taken against McClure on Friday that they were a part of the *res gestæ* of the offense charged.

The motion in arrest on the ground of the insufficiency of the information has already been considered.

Judgment that there was no error in the proceedings of the county court, and that the respondents take nothing by their exceptions.

NOTE.—*Combinations among workmen—Lawful and unlawful means.*—Mr. Justice Gaines, an able jurist, in the case of *Queen Ins. Co. et al. v. State ex rel. Atty. General*, 86 Tex. 250, in the course of an elaborate opinion, in which this and similar subjects are discussed, says:

"Combinations among workmen, to increase or maintain their wages by unlawful means, are unlawful. But are such combinations unlawful when the only means resorted to to accomplish their objects is a refusal, on part of the parties to the agreement, to accept employment at a lower rate of wages than that designated in the contract? This is the next question for determination, and it is not without difficulty. In treating of criminal conspiracies, Mr. Bishop says: 'Whatever the language of some of the old cases, no lawyer of the present day would hold it indictable for men simply to associate to promote their own interests, or specifically to raise their wages. If the means adopted were mutual improvement of their mental or physical powers, mutual instruction in their methods of doing their work,

mutual inquiring and imparting information as to the wages paid in other localities, or anything else of a like helpful nature, severally enabling the members to obtain higher wages, nothing could be more commendable, and nothing further from the inhibition of the law; or, if employers should combine simply to reduce wages, not proposing any unlawful means, perhaps we might not so much commend them, yet still they would stand under no disfavor from the law—the result of which is that a conspiracy to enhance or reduce wages is not indictable *per se*, while yet it may be so by reason of proposed unlawful means." 2 Bish. Crim. Law, § 233, subd.

The author then proceeds to consider certain means which have been determined to be unlawful, in which a mere agreement, by men not already under contract, not to work unless for a certain rate of wages, does not seem to be included. But the matter seems to be involved in some obscurity.

In a previous section the author cites the remarks of distinguished English judges, including Lord Mansfield, to the effect that such agreements are unlawful in themselves, but adds: "In a later case, Earle, J., perhaps with a view to conforming to the statute of 6 Geo. IV., c. 129, § 4, yet distinctly qualifying the words of Lord Mansfield, stated it as settled that workmen are at liberty, while they are perfectly free from engagements, and have the option of entering into employment or not, to agree among themselves to say, 'We will not go into any employ unless we can get a certain rate of wages.'" Mr. Freeman, in his note to the case of *People v. Fisher*, 14 Wend. 9, says: "Recent decisions in England, and the spirit now prevailing there and in this country, of giving encouragement to workmen in their endeavors to associate themselves into organizations for their mutual benefit, have settled beyond question that unemployed workmen may unite, and agree not to work unless for a certain price. This is a plain right, upon which no doubt ought ever to have existed." 28 Amer. Dec. 508. The learned annotator then quotes: "The law is clear that workmen have a right to combine for their own protection, and to obtain such wages as they may choose to agree to demand;" citing *Reg. v. Rowlands*, 5 Cox Crim. Cas. 436, 460.

In *Com. v. Hunt*, 4 Metc. (Mass.) 111, it was held by the Supreme Court of Massachusetts that an association among journeymen bootmakers, in which they bound themselves not to work for any person who employed one not a member of the association, was not indictable at common law. Following that decision, that court also held, in *Bowen v. Matheson*, 14 Allen, 499, that an agreement among certain defendants by which they sought to compel the plaintiff, a shipping master, among other things, to ship men from them at an established rate of wages, was not illegal, and did not give a ground of action, although the plaintiff's business had been damaged by the conspiracy. So, also, in *Carew v. Rutherford*, 106 Mass. 10, they say that "it is no crime for any number of workmen to associate themselves, and agree not to work for or deal with certain men or certain classes of men, or work under certain wages or without certain conditions." We take it, therefore, that the weight of authority is against the proposition that such a combination among workmen was indictable at common law.

Abandonment of.—Where two persons enter into a conspiracy to commit a murder, and the plan agreed on is that one of the conspirators shall lie in wait in ambush for their victim, the mere declaration of the one so

lying in ambush that at one time he mentally gave up the idea of committing the crime, where the evidence shows no act indicating an abandonment or change of purpose, and where it clearly appears that the crime was actually perpetrated in pursuance of the original conspiracy, is not sufficient to show an abandonment of the criminal design, and does not warrant an acquittal of the defendant. *State v. Gray*, 55 Kans. 135.

MURRAY V. LOUISIANA.

(163 U. S. 101.)

CONSTITUTIONAL LAW: *Excluding colored citizens from juries—How right protected—Constitutional right to meet witness face to face.*

1. Section 641, Revised Statutes of the United States, does not embrace a case in which a right is denied by judicial action during a trial, or in the sentence, or in the mode of executing the sentence. For such denials, arising from judicial action after a trial commenced, the remedy lies in the revisory power of the higher courts of the State, and ultimately in the power of review which this court may exercise over their judgments whenever rights, privileges or immunities claimed under constitutions or laws of the United States are withheld or violated. The denial of, or inability to enforce in the judicial tribunals of a State, rights secured by any law providing for the equal civil rights of citizens of the United States, to which § 641 refers, and on account of which a criminal prosecution may be removed from a State court, is, primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the constitution or laws of the State, rather than a denial first made manifest at and during the trial of the case.
2. The State court of Louisiana, on the trial of the plaintiff in error for murder, permitted to be read in evidence the testimony of a witness taken in the presence of the accused at a preliminary hearing, read to and signed by the witness, as his attendance could not be procured. The bill of exceptions did not present the objection in proper form, and the court holds that there is nothing in the record which would authorize this court to convict the Supreme Court of Louisiana of error in that behalf.
3. Rulings of the court below, refusing writs of subpoena *duces tecum*, held to work no injury to defendant.

Error to the Supreme Court of the State of Louisiana.

In October, 1894, in the Criminal District Court for the Parish of Orleans, State of Louisiana, an indictment for murder was found against one Jim Murray, alias Greasy Jim. On December 13, 1894, the accused was arraigned, pleaded not guilty, and was remanded for further proceedings.

On January 10, 1895, Thomas F. Maher, as attorney for the accused, challenged the grand jury on the ground that it was not a legally constituted body, because the jury commissioner had discriminated against the prisoner on account of his race and color, by having excluded from the venire from which the grand jury was selected all colored men or negroes, which action was charged to be in conflict with the Constitution and laws of Louisiana and with the Constitution of the United States.

To procure evidence to sustain his said challenge, the accused, by his counsel, asked for a subpoena *duces tecum*, directed to Francis C. Zachaire, register of the voters of the parish of Orleans, calling on him to furnish the total number of voters registered in the parish; the total number of white voters registered; the total number of colored voters; the total number of whites and of colored voters who could sign their names at the closing of the registration office of the parish previous to the last congressional election, held on November 6, 1894. Also for a subpoena *duces tecum*, addressed to the jury commissioners of the parish, commanding them to furnish the court, on the trial of the challenge to the grand jury, the names and residences of thirty-five hundred citizens who appeared before them in the month of September, 1894, for qualification as jurors, and the names and residences of the one thousand citizens whom they qualified and placed in the jury wheel, from which the grand jury, which found the indictment in the present case, was drawn. These motions for subpoenas were indorsed by the minute clerk as follows: "Filed subject to orders."

On February 2, 1895, the challenge to the grand jury came on to be heard.

Apparently to save time, the state's attorney offered in evidence and as part of the present record the evidence taken before another section of the court, in the case of *State of Louisiana v. George Heard*, on a challenge to the grand jury, in which similar grounds of challenge had been made. The counsel for the accused, who had also acted as counsel for George Heard, made no objection to the filing of this evidence, but himself filed, as part of the present record, the assignments of error and the bills of exceptions filed by him in the other case.

Among other things there appeared in this evidence in the case of Heard, and was read to the court in the present case, the return of the registry clerk, showing a statement of registered voters of the parish of Orleans, after the general election of November, 1892, viz.: Total number of voters, 59,262, of whom there were native white who sign, 35,382; native born who make their mark, 4,571; foreign white who sign, 8,283, and who make their mark, 1,672; colored who sign, 5,431, and who make their mark, 4,223. This admitted record contained the testimony of several deputy sheriffs, who served jury summons, and which went to show that few persons of color were so summoned; also the testimony of the three jury commissioners, who testified that colored persons were summoned to appear before the commissioners to qualify as jurors, and that there were names of colored persons in the jury wheel from which this grand jury was drawn. They testified that in taking names from the registration list the commissioners selected them with reference to their qualification as jurors, without regard to color; that a great many colored men were summoned, and there was no discrimination against colored men.

The court held that the plaintiff's challenge was not sustained by the evidence; that while it was undeniable that the exclusion from the general service of all people of the African race on account of their color would be an unlawful abridgment of the rights of such citizens, yet that the evidence did not disclose such a case, but showed that the general service was not exclusively made up of the names of white persons, and that it was clearly established that colored people were not excluded on account of their race or color. The challenge was overruled. To which action of the court the accused by his counsel took several exceptions, which were duly allowed and signed.

The defendant then by his attorney made a motion to quash the indictment, upon the allegation that act No. 170 of the acts of 1894, under the provisions of which the grand jury which indicted the accused was organized, was unconstitutional, because it did not conform to the provisions of the State and Federal Constitutions, which provide that there shall be no discrimination on account of race, color or previous condition of servitude. The motion to quash was overruled, and thereupon the accused filed an application

for the removal of the cause to the Circuit Court of the United States. The allegations of the petition to remove stated the action of the court in overruling the challenge of the grand jury, and that there was a local prejudice against the accused, as a colored man charged with having murdered a white man, which would prevent a fair and impartial trial in any State court. This petition was filed in the State court on February 19, 1895. On February 28, 1895, the trial was commenced, and was so proceeded in that on March 1, 1895, the jury found a verdict of guilty.

On March 7, 1895, a motion for a new trial and a motion in arrest of judgment, were filed. In a petition accompanying these motions it was made to appear that on February 26, 1895, the accused had filed in the Circuit Court of the United States a petition for a writ of *habeas corpus*, and for an injunction forbidding the State court to proceed. No action in the matter appears to have been taken by the United States Circuit Court.

The motion for a new trial and the motion in arrest of judgment were refused, and on March 7, 1895, sentence of death was pronounced against the accused. Certain bills of exceptions to the charge and rulings of the court were signed, and an appeal to the Supreme Court of Louisiana was allowed. On June 3, 1895, the Supreme Court affirmed the judgment of the trial court, and by a writ of error that judgment of the Supreme Court of Louisiana was brought to this court.

Mr. Thomas F. Maher, for plaintiff in error.

Mr. M. J. Cunningham, Attorney General of the State of Louisiana, and *Mr. Alexander Porter Morse*, for defendant in error, submitted on their brief.

Mr. Justice SHIRAS, after stating the case, delivered the opinion of the court.

Several of the assignments of error bring into question the correctness of the judgment of the Supreme Court of the State of Louisiana, affirming the action of the trial court in proceeding with the trial, in disregard of a petition by the accused to have the cause removed into the Circuit Court of the United States, upon the allegation that the petitioner was a negro, and that persons of African descent were, by reason of their race

and color, excluded by the jury commissioners from serving as grand and petit jurors.

To dispose of such assignments it is sufficient to cite *Neal v. Delaware*, 103 U. S. 370, and *Gibson v. Mississippi*, 162 U. S. 565, decided at the present term, in which, after careful consideration, it was held that Congress had not, by section 641 of the Revised Statutes, authorized a removal of the prosecution from the State court upon an allegation that jury commissioners or other subordinate officers had, without authority derived from the Constitution and laws of the State, excluded colored citizens from juries because of their race; that said section did not embrace a case in which a right is denied by judicial action during a trial, or in the sentence, or in the mode of executing the sentence; that for such denials arising from judicial action after a trial commenced, the remedy lay in the revisory power of the higher courts of the State, and ultimately in the power of review which this court may exercise over their judgments whenever rights, privileges or immunities claimed under the Constitution or laws of the United States are withheld or violated; and that the denial or inability to enforce, in the judicial tribunals of the States, rights secured by any law providing for the equal civil rights of citizens of the United States, to which section 641 refers, and on account of which a criminal prosecution may be removed from a State court, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at and during the trial of the case.

The petition for removal complained of the acts of the jury commissioners, in illegally confining their summons to white citizens only, and in excluding from jury service citizens of the race and color of the petitioner, but did not aver that the jury commissioners so acted under or by virtue of the laws or Constitution of the State; nor was there shown, during the course of trial, that there was any statutory or Constitutional enactment of the State of Louisiana which discriminated against persons on account of race, color or previous condition of servitude, or which denied to them the equal protection of the laws.

Other assignments ask our attention to errors alleged to have been committed in the course of the trial. It is claimed

that the rights of the accused were disregarded in the proceedings under his challenge to the grand jury. The principal matters complained of seem to be the action of the court in indorsing on the challenge to the grand jury the words, "filed subject to argument on face of papers;" and on the motion for subpoena *duces tecum*, directed to the registrar of voters, the words "filed subject to orders," and on the motion for subpoena *duces tecum*, addressed to the jury commissioners the words "filed subject to orders;" and it is claimed that such indorsements were irregular, deprived the accused of opportunity to sustain the allegations contained in his written challenge, and deprived him of due process of law.

The indorsements or orders made upon the various papers appear to us to have only signified that the court withheld immediate action on the motions. They evidently were not treated by the court as concluding the accused, because the record shows that subsequently the hearing of the challenge was proceeded in, and that evidence was adduced by both the State and the accused.

An exception was taken to the refusal of the court to grant what was termed a subpoena *duces tecum*, directed to Francis E. Zacharie, registrar of voters. The reason given by the court was that the so-called writ of subpoena *duces tecum* did not purport to be such, did not describe or refer to any paper or document which was in the possession of the registrar, and which the defendant required.

The court was of opinion that either the defendant should have specified the books or documents required, or, if he wished information from the registrar, he should have subpoenaed him to attend and testify. We perceive no error in this action.

Exception was likewise taken to the refusal of the court to grant a writ of subpoena *duces tecum* on the jury commissioners, not commanding them to produce specified books or papers, but that they should furnish the names and residences of the 3,500 citizens whom they had summoned to qualify as jurors. The court thought that the writ asked for was not a writ of subpoena *duces tecum*, and that the defendant, if he desired information from the commissioners, should have subpoenaed them to attend as witnesses. Besides, the defendant

had the advantage of their testimony by consenting to the use of their evidence in the Heard case.

At all events, no injury was suffered by the defendant by the refusal of the court to grant him the writs prayed for, because the evidence he desired to get did not tend to show that the rights of the accused were denied by the constitution or laws of the State, and therefore did not authorize the removal of the prosecution from the State court.

A more serious question is presented by an exception to the action of the trial court in permitting to be read the evidence of one King Jones, which had been taken in the presence of the accused in open court at a preliminary hearing, and read to and signed by the witness. The reason given by the district attorney for the use of the deposition, was that after due diligence he was unable to procure the attendance of the witness, who was not within the jurisdiction of the court.

The record, however, discloses that the bill of exceptions to the allowance of this evidence was not presented for signature to the judge until March 14, 1895, two weeks after the sentence was rendered, and after a new trial had been refused and an appeal allowed. No error was assigned in the Supreme Court of Louisiana, to the admission of this evidence, nor is it made the subject of assignment in this court. Neither does the record disclose the nature or effect of the testimony so admitted. In the absence of a bill of exceptions, disclosing at least the substance of the evidence, and of an assignment of error, we are permitted to suppose that the evidence was trivial, and that it did no injury to the defendant. We certainly have nothing in this record which would authorize us to convict the Supreme Court of Louisiana of any error in that behalf.

There was a motion to quash the indictment, on the ground that act No. 170, of 1894, under the provisions of which the grand jury was drawn, was unconstitutional in that it was alleged to be a local or special law, and not enacted according to a constitutional requirement of previous public notice. This motion was refused by the trial court, and its action was approved by the Supreme Court of the State. Error is assigned in this court, but no Federal question is thereby presented.

Nor can we perceive any merit in the assignment which avers that this act, No. 170, is in conflict with the Fourteenth Amendment to the Constitution of the United States,

because such law is alleged to confer on the jury commissioners of the parish of New Orleans judicial powers in the selection of citizens for jury services. It is not pretended that the accused was subjected to any other or different treatment, in respect to that feature of the statute, than that which prevails in other cases, or on the trial of white citizens.

A careful inspection of this record has failed to disclose any particular in which the accused was deprived of any right or immunity secured to him under the laws or Constitution of the United States, and the judgment of the Supreme Court of Louisiana is accordingly affirmed.

NOTE.—*In all criminal prosecutions the accused shall enjoy the right * * * "to be confronted with the witnesses against him."*—What was the aim and object of this declaration found in the sixth amendment to the Federal Constitution, a counterpart of which is embodied in the Bill of Rights, in the Constitution of every State in the Union? Does it mean that if the accused be confronted with the witnesses against him at a preliminary hearing, or coroner's inquest, that the statements given in evidence on such a hearing or investigation may be given in evidence at the trial should it appear that the witnesses were dead or had gone beyond the seas? Not at all. Such a holding would virtually eliminate all of the declaration from the Bill of Rights.

Under such conditions how could the traverse jury discern the demeanor of the witness when on the stand? The paper testimony would not reproduce before the jury, the facial expressions, the halting and changing of voice, the forced self-assertion and abandon, which so markedly reveal the character of the witness when testifying, and constitute almost unerring indications of the truth or falsehood of his testimony. History, reason and the philosophy of the law, verify the force and correctness of the conclusion that the aim and object of this declaration is to secure to the accused the right to be brought face to face with the witness testifying against him, before that jury which is the arbiter of his right to life or liberty.

Before reviewing some of the historic incidents which the framers of the Constitution most likely had in mind when they penned this declaration of right, let me here solemnly admonish judges, especially of courts of review, to cling closely, with jealous care, to the landmarks of the Constitution, and to hold it their bounden duty to see to it that no person, however humble, shall be denied any right or privilege guaranteed him by that instrument.

My own experience and observation, at the bar and on the bench, in the trial of criminal causes, emphasize the truth of the assertion that notwithstanding the intellectual and moral advance of to-day over all the ages which have gone before, the danger of innocent persons being convicted to appease popular sentiment is just as great now as it was when every official held his commission from the king.

How many times within the memory of us all have innocent men been indicted by a star-chamber grand jury, tried and convicted at the bar of

public opinion through the powerful influence of the press, and who would have been sent to the penitentiary, perchance to the gallows, but for the timely interposition of friends or neighbors, through whose aid the victims were enabled to employ counsel to prepare their defense and establish their innocence.

It is safe to assume that the fathers of the Constitution could not have been unmindful of the teachings of history, touching the star chamber and the inquisition, those tribunals of infamy and terror, before whom men were condemned to death upon depositions and statements in writing from witnesses unknown to the accused, or by spurious confessions and admissions wrung from the prisoner by torture and terror.

The inestimable value of the right to the accused of being confronted with one whose testimony is against him is most strongly illustrated in the sacred writings, as well as in the history of criminal jurisprudence. We are told that when Adam broke the Divine command he hid himself from the face of the Lord. After Peter denied the Christ, when the Lord turned and looked upon him he remembered the word of the Lord and Peter went out and wept bitterly (Luke, Chap. 22, par. 61 and 63). Again in Acts of the Apostles, Chap. 25, when Paul was a prisoner at Cesarea, King Agrippa visited Festus, the governor, and when the king had been there many days Festus declared Paul's case unto the king. "There is a certain man left in bonds by Felix, about whom, when I was at Jerusalem, the chief priests and the elders of the Jews informed me, desiring to have judgment against him. To whom I answered, 'It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him.'"

When affidavits were read to Mary, Queen of Scots, in prison, imputing to her great crimes, the unfortunate queen answered: "Who are the witnesses (for they were not even named to her); bring them before me and they will forswear their falsehoods when they meet me face to face."

In 1589 Philip Howard, Earl of Arundel, was tried for high treason, Gerard and Shelly being witnesses against him. These witnesses accused him of having offered up his prayers for the success of the Spanish expedition against England; Arundel declared that his prayers were only for the preservation of himself and fellow Catholics from the general massacre to which report had said they were doomed in the event of the Spaniards effecting a landing; then fixing his eyes upon Gerard and adjuring him to "speak nothing but the truth, as he must one day stand before the tribunal of the living God to answer for what he should then say," he so daunted and disconcerted the witness that he lost his utterance and was unable to repeat his first assertion.

Sir Walter Raleigh was convicted of high treason, chiefly upon the written statement of one Cobham, which he denied in a letter to Raleigh, but afterward re-affirmed in part in a letter to the lords, the evening before the trial. Upon the trial, Sir Walter Raleigh demanded that Cobham should be confronted by him; he appealed to the statute law, and to the law of God, which required two witnesses; he even offered to abandon his defense if his accuser would dare to assert, in his presence, that he had ever advised any dealing whatever with the Spanish monarch. He demanded again that

his accuser stand forth, and if Cobham dared to re-affirm a single charge before his face, he would submit in silence to his fate.

It is unnecessary to multiply cases, for the whole record of each State Trial is but the recital of judicial murders, planned by conscienceless and envious officials, and perpetrated through that inhuman system of jurisprudence which permitted affidavits, letters and depositions to be read in evidence against the accused.

Judges, let me again admonish you to make the Constitution the touchstone of your official action.

ROSEN v. UNITED STATES.

(161 U. S. 29.)

CONSTITUTIONAL LAW: *Indictment—Sufficiency of—Right of accused to be informed of accusation against him—Obscene publications.*

1. The constitutional right of a defendant to be informed of the nature and cause of the accusation against him, entitles him to insist, at the outset, by demurrer or by motion to quash, and, after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offense. It is the privilege of the accused in such case, to apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd and lascivious, which motion will be granted or refused, as the court, in the exercise of a sound legal discretion, may find necessary to the ends of justice.
2. Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd and lascivious.
3. When the evidence before the jury, if clear and uncontradicted, upon any issue made by the parties, presents a question of law, the court can, without usurping the functions of the jury, instruct them as to the principles applicable to the case by such evidence.

Error to the Circuit Court of the United States for the Southern District of New York.

The case is stated in the opinion.

Mr. William N. Cohen, for plaintiff in error.

Mr. Assistant Attorney General Whitney, for defendant in error.

Mr. Justice HARLAN delivered the opinion of the court.

The plaintiff in error was indicted under section 3893 of the

Revised Statutes, providing that "every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, or book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means, any of the hereinbefore mentioned matters, articles, or things may be obtained or made, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any postoffice, nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating, or disposing of, or of aiding in the circulation or disposition of the same, shall be deemed guilty of a misdemeanor, and shall for each and every offense be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court."

The defendant pleaded not guilty, and the trial was entered upon without objection in any form to the indictment as not sufficiently informing the defendant of the nature of the charge against him.

A verdict of guilty having been returned, the accused moved for a new trial upon the ground, among others, that the indictment was fatally defective in matters of substance. That motion was denied.

The defendant thereupon moved in arrest of judgment, upon the ground that the indictment did not charge that he knew, at the time, what were the contents of the paper deposited in the mail and alleged to be lewd, obscene, and lascivious. This motion was also denied, and the accused was sentenced to imprisonment at hard labor during a period of thirteen months, and to pay a fine of one dollar.

The paper, "Broadway," referred to in the indictment, was produced in evidence, first, by the United States, and afterward by the accused. The copy read in evidence by the government was the one which, it was admitted at the trial, the

defendant had caused to be deposited in the mail. The picture of females appearing in that copy were, by direction of the defendant, partially covered with lamp black that could be easily erased with a piece of bread. The object in sending them out in that condition was, of course, to excite a curiosity to know what was thus concealed. The accused read in evidence a copy that he characterized as a "clean" one, and in which the pictures of females, in different attitudes of indecency, were not obscured by lamp black.

The defendant having indicated his purpose to bring the case here for review, the court below ordered these papers to be sent to the clerk of this court with the transcript of the proceedings below.

The first contention of the plaintiff in error is, that the indictment was fatally defective in not alleging that the paper in question was deposited in the mail with knowledge on his part that it was obscene, lewd, and lascivious.

The indictment charged that the accused, on the 24th day of April, 1893, within the Southern District of New York, "did unlawfully, wilfully, and knowingly deposit and cause to be deposited in the postoffice of the city of New York, for mailing and delivery by the postoffice establishment of the United States, a certain obscene, lewd, and lascivious paper; which said paper then and there, on the first page thereof, was entitled 'Tenderloin Number, Broadway,' and on the same page were printed the words and figures following * * * that is to say: 'Volume II, number 27, trade-mark, 1892; by Lew Rosen; New York, Saturday, April 15, 1893; ten cents a copy, \$4 a year, in advance; and thereupon, on the same page, is a picture of a cab, horse, driver, and the figure of a female, together (underneath the said picture) with the word 'tenderloineuse;' and the said paper consists of twelve pages, minute descriptions of which, with the pictures therein and thereon, would be offensive to the court and improper to spread upon the records of the court, because of their obscene, lewd, and indecent matters; and the said paper, on the said twenty-fourth day of April, in the year one thousand eight hundred and ninety-three, was inclosed in a wrapper and addressed as follows — that is to say, 'Mr. Geo. Edwards, P. O. box 510, Summit, N. J.' — against the peace of the United States

and their dignity, and contrary to the statute of the United States in such case made and provided."

Undoubtedly the mere depositing in the mail of a writing, paper, or other publication of an obscene, lewd, or lascivious character, is not an offense under the statute if the person making the deposit was, at the time and in good faith, without knowledge, information, or notice of its contents. The indictment would have been in better form if it had more distinctly charged that the accused was aware of its character. But this defect should be regarded, after verdict and under the circumstances attending the trial, as one of form under section 1025 of the Revised Statutes providing that the proceedings on an indictment found by a grand jury in any District, Circuit, or other court of the United States, shall not be affected "by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." *United States v. Chase*, 27 Fed. Rep. 807; *United States v. Clark*, 37 Fed. Rep. 106.

The indictment on its face implies that the defendant owned or managed the paper, Broadway. He admitted at the trial that he owned and controlled it. He did not pretend that he was ignorant at the time, of the contents of the particular number that he caused to be put in the postoffice at New York. The general charge that he "unlawfully, wilfully, and knowingly deposited and caused to be deposited in the post-office * * * a certain obscene, lewd, and lascivious paper"—describing it by its name, volume, number, date of trademark, date of issue, and as having on it the name of Lew Rosen, proprietor, the same name borne by the defendant, may not unreasonably be construed as meaning that the defendant was, and must have been, aware of the nature of its contents at the time he caused it to be put into the postoffice for transmission and delivery. Of course he did not understand the government as claiming that the mere depositing in the postoffice of an obscene, lewd, and lascivious paper was an offense under the statute, if the person so depositing it had neither knowledge nor notice, at the time, of its character or contents. He must have understood from the words of the indictment that the government imputed to him knowledge or notice of the contents of the paper so deposited.

In their ordinary acceptation, the words "unlawfully, wil-

fully, and knowingly," when applied to an act or thing done, import knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing; and when used in an indictment in connection with the charge of having deposited in the mails an obscene, lewd, and lascivious paper, contrary to the statute in such case made and provided, could not have been construed as applying to the mere depositing in the mail of a paper the contents of which at the time were wholly unknown to the person depositing it. The case is therefore not one of the total omission from the indictment of an essential averment, but, at most, one of the inaccurate or imperfect statement of a fact; and such statement, after verdict, may be taken in the broadest sense authorized by the words used, even if it be adverse to the accused.

The defendant also contends that the indictment was fatally defective, in that it did not set out with reasonable particularity those parts of the paper relied on to support the charge in the indictment. He insists that the omission from the indictment of a description of the pictures of female figures found in the paper was in violation of the constitutional guaranty that the defendant in a criminal case shall be informed of the nature and cause of the accusation against him. Sixth amendment.

A defendant is informed of the nature and cause of the accusation against him, if the indictment contains such description of the offense charged as will enable him to make his defense, and to plead the judgment in bar of any further prosecution for the same crime. Does the indictment in this case meet these requirements? It described the paper alleged to be obscene, lewd, and lascivious with such minuteness as to leave no possible doubt as to its identity. If the defendant did not have in his possession or could not procure a duplicate of such paper, he could have applied to the court for an order that he be furnished with a bill of particulars to the end that he might properly defend himself at the trial. *United States v. Bennett*, 16 Blatchford, 338, 351; *Rex v. Hodyson*, 3 Car. & P. 422; Wharton's Crim. Pl. & Pr., § 702. He made no such application but went to trial without suggesting that he was not sufficiently informed by the indictment of the nature and cause of the accusation against him. When the paper in question was produced in evidence he made no objection to it as

not being sufficiently described in the indictment, but at the conclusion of the evidence on the part of the prosecution moved to dismiss on the ground that the paper was not obscene. This motion having been overruled he testified in his own behalf, offering in evidence a duplicate of the same paper, admitting that lamp-black—capable of being easily removed so as to bring each offensive picture in full view of any person receiving or inspecting the paper—had by his direction been put on the entire edition of April 15, 1893. He now insists that the indictment was fatally defective, because it did not disclose in detail the contents of the twelve pages that were charged to constitute an obscene, lewd and lascivious paper. If it be said that he did not know what part of the twelve pages were considered by the grand jury as obscene, lewd, and lascivious, the answer is that he was not entitled to know what passed in the conferences of grand jurors. He was not entitled to show, as matter of defense, that the grand jury proceeded on insufficient grounds. He had to meet only the case made by the indictment and by the evidence adduced by the government. And if he wished to be informed, before entering upon the trial, what particular parts of the paper would be relied on as bringing the case within the statute, he could, as already suggested, have applied for a bill of particulars, which the court, in the exercise of a sound legal discretion, might have granted or refused as the ends of justice required.

The principal authority relied on in support of the defendant's contention is the case in England of an indictment for publishing an obscene libel, namely, "a certain indecent, lewd, filthy, and obscene book called 'Fruits of Philosophy,' thereby contaminating, vitiating and corrupting the morals," etc. The jury found that the book was obscene, and a motion in arrest of judgment was made by accused. The motion was denied; Cockburn, C. J., Mellor, J., concurring, held: "If the omission is in the indictment—if that be the objection, and it be a valid one—it is an objection that ought to have been taken by demurrer, and, therefore, I can not help thinking that, upon the balance of convenience, we shall act more wisely in saying that the judgment pronounced on this indictment ought not to be set aside by making the motion absolute to arrest the judgment; but, if there be any valid foundation

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for the contention the defendants have raised upon the indictment, it should be taken by demurrer." *Queen v. Bradlaugh*, 2 Q. B. D. 569, 573. The judgment was reversed in the Court of Appeal, which held that in an indictment for publishing an obscene book, described only by its title, the words alleged to be obscene must be set out, and their omission would not be cured by a verdict of guilty. In his opinion in that case, Lord Justice Brett considered what kind of omissions would be cured by verdict, and declared, as the result of the authorities, that "in every kind of crime which consists in words, if the words complained of are not set out in the indictment or information, the objection is fatal in arrest of judgment." But he also said: "I would strike out of the category of the cases which we are considering all cases with regard to obscene prints and obscene pictures. The publication of obscene prints and obscene pictures may be in one sense libellous, but they are not words, and therefore they do not seem to me to fall within the rules as to criminal pleadings, which we are considering here to-day." *Bradlaugh v. Queen*, 3 Q. B. D. 607, 634.

Looking at the cases in the American courts, we find that in *Commonwealth v. Sharpless*, 2 Seargeant & Rawle, 91, 103, (1815), which was an indictment for exhibiting an obscene picture, it was objected, after verdict and on motion in arrest of judgment, that the picture was not sufficiently described. Chief Justice Tilghman said: "We do not know that the picture had any name, and, therefore, it might be impossible to designate it by name. What, then, is expected? Must the indictment describe minutely the attitude and posture of the figures? I am for paying some respect to the chastity of our records; these are circumstances which may be well omitted. Whether the picture was really indecent, the jury might judge from the evidence, or if necessary, from inspection; the witnesses could identify it. I am of opinion, that the description is sufficient."

The question was considered in Massachusetts, in 1821, in *Commonwealth v. Holmes*, 17 Mass. 336, 337. That was an indictment for publishing a lewd and obscene print, contained in a certain book entitled "Memoirs of a Woman of Pleasure," and for publishing the same book. Two of the counts alleged that the printed book was so lewd, wicked

and obscene "that the same would be offensive to the court here, and improper to be placed upon the records thereof." Chief Justice Parker, speaking for the court, held these counts to be good, saying: "It can never be required that an obscene book and picture should be displayed upon the records of the court; which must be done, if the description in these counts is insufficient. This would be to require that the public should give permanency and notoriety to indecency, in order to punish it." Subsequently, in *Commonwealth v. Turbox*, 1 Cush. 66, 72, which was an indictment under a State enactment for printing, publishing, and distributing an obscene paper, the court said: "In indictments for offences of this description, it is not always necessary that the contents of the publication should be inserted; but whenever it is necessary to do so, or whenever the indictment undertakes to state the contents, whether necessary or not, the same rule prevails as in the case of libel, that is to say, the alleged obscene publication must be set out in the very words of which it is composed, and the indictment must undertake or profess to do so, by the use of appropriate language. The excepted cases occur whenever a publication of this character is so obscene as to render it improper that it should appear on the record; and then the statement of the contents may be omitted altogether, and a description thereof substituted; but, in this case, a reason for the omission must appear in the indictment, by proper averments. The case of *Commonwealth v. Holmes*, 17 Mass. 336, furnishes both an authority and a precedent for this form of pleading." In *Commonwealth v. McCance*, 164 Mass. 162, an indictment charging the defendant with selling a certain book containing, among other things, obscene language, was held to be insufficient. The court distinguished the case before it from previous cases, and said that while the principle announced in *Commonwealth v. Holmes* must be regarded as an exception to the general rule relating to libellous publications, the weight of authority in this country was in favor of that decision.

So in *People v. Girardin*, 1 Michigan, 90, 91, which was an indictment for printing and publishing a certain paper described by its title, and characterized as wicked, obscene, etc., the court said: "There is another rule as ancient as that contended for by the counsel for the prisoner, which forbids the

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introduction in an indictment of obscene pictures and books. Courts will never allow their records to be polluted by bawdy and obscene matters. To do this would be to require a court of justice to perpetuate and give notoriety to an indecent publication, before its author could be visited for the great wrong he may have done to the public or to individuals. And there is no hardship in this rule. To convict the defendant, he must be shown to have published the libel; if he is the publisher he must be presumed to have been advised of the contents of the libel, and fully prepared to justify it. The indictment in this cause corresponds with the precedents to be found in books of the highest merit."

In *State v. Brown*, 27 Vermont, 619, in which the indictment stated that the grand jurors omitted from the indictment the lewd and obscene paper alleged to have been sold, because it would be offensive to the court and improper to be placed on the records of the court, Chief Justice Redfield said: "Ordinarily the indictment, in a case like the present, should set forth the book or publication *in haec verba*, the same as in indictments for libel or forgery. This seems to be an acknowledged principle in the books. But even in indictments for forgery, it may be excused, as if the forged instrument is in the possession of the opposite party. So, also, in a case like the present, if the publication be of so gross a character that spreading it upon the record will be an offense against decency it may be excused, as all the English precedents show. Some of the precedents are much like the present, describing the obscene character of the publication in general terms. But more generally the nature of the publication is more specifically described. But in both cases the principle of the case is the same. If the paper is of a character to offend decency and outrage modesty, it need not be so spread upon the record as to produce that effect. And if it is alleged, in such case, to be a publication within the general terms in which the offense is defined by the statute, it is sufficient, which seems to be done in the present case. The degree of particularity with which the paper could be described without exposing its grossness, would depend something upon the nature of that feature, whether it consisted in the words used or the general description given. In the

former case it could not be more particularly described than it here is without offending decency."

In *McNair v. The People*, 89 Illinois, 441, 443, the question was whether the indictment for printing, having in possession and giving away, an obscene and indecent picture, was sufficient under a provision of the Illinois Criminal Code, declaring that an indictment should be deemed sufficiently technical and correct, which stated the offense in the terms and language of the statute creating the offense, or so plainly that the nature of the offense could be easily understood. The court, speaking by Mr. Justice Walker, said that "it was necessary to set out the supposed obscene matter in the indictment, unless the obscene publication is in the hands of the defendant, or out of the power of the prosecution, or the matter is too gross and obscene to be spread on the records of the court, either of which facts, if existing, should be averred in the indictment as an excuse for failing to set out the obscene matter; that, whether obscene or not, is a question of law and not of fact; that the question is for the court to determine, and not for the jury." To the same effect are *Fuller v. The People*, 92 Ill. 182, 184; *State v. Smith*, 17 R. I. 371, 374-5.

The earlier cases were fully examined by Mr. Justice Blatchford, when he was a judge of the Circuit Court, in *United States v. Bennett*, 16 Blatchford, 338, 351, in which it was charged that the defendant "did unlawfully and knowingly deposit, and cause to be deposited, in the mail of the United States, then and there, for mailing and delivery, a certain obscene, lewd and lascivious book, called 'Cupid's Yokes, or the Binding Forces of Conjugal Life,' which said book is so lewd, obscene and lascivious, that the same would be offensive to the court here, and improper to be placed upon the records thereof; wherefore, the jurors aforesaid do not set forth the same in this indictment." Speaking for himself and Judges Benedict and Choate, Mr. Justice Blatchford said: "In the present indictment, the defendant had information given to him as to the offense charged, by the date of the mailing, by the title of the book, and by the address on the wrapper. The indictment states the reason for not setting forth the book to be that it is too obscene and indecent to be set forth. A copy of the book, with a designation of the obscene passages relied on, could have been obtained before the trial, by asking for a

bill of particulars. The defendant was not deprived of the right 'to be informed of the nature and cause of the accusation.' The weight of authority, as well as of reasoning, is in favor of the sufficiency of the present indictment."

The doctrine to be deduced from the American cases is, that the constitutional right of the defendant to be informed of the nature and cause of the accusation against him, entitles him to insist, at the outset, by demurrer or by motion to quash, and after verdict by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty, that he can make his defense and protect himself after judgment against another prosecution for the same offense; that this right is not infringed by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him; and that, in such case, the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd and lascivious, which motion will be granted or refused, as the court, in the exercise of a sound legal discretion, may find necessary to the ends of justice.

The refusal of the court to arrest the judgment was not erroneous. The defendant knew from the indictment itself what paper or publication would be offered by the government in evidence, and that the prosecution would insist that the pictures of females displayed in that paper were obscene, lewd and lascivious. It is said that some of the printed matter and pictures in the paper could not possibly be regarded as of that class. That fact is not disclosed by the indictment. Besides, the failure to set out such matters and pictures could not have prejudiced the accused. The paper being offered in evidence, if it appeared that some of the printed matter or some of the pictures were not obscene, lewd or lascivious, the jury could have been instructed upon that subject at the instance of either party. But, as we have already said, the defendant did not ask for a bill of particulars nor object to the indictment as insufficient, but made his defense upon the broad ground that

the paper that he caused to be deposited in the postoffice was not obscene, lewd or lascivious.

We are of opinion that the indictment sufficiently informed the accused of the nature and cause of the accusation against him, and that there was no legal ground for an arrest of the judgment.

At the trial below, the defendant, by his counsel, asked the court to instruct the jury that he should be acquitted, if they entertained a reasonable doubt whether he knew that the paper or publication referred to in the indictment, was obscene. This request was refused, and an exception was taken to the ruling of the court.

This request for instructions was intended to announce the proposition that no one could be convicted of the offense of having unlawfully, wilfully and knowingly used the mails for the transmission and delivery of an obscene, lewd and lascivious publication—although he may have had at the time actual knowledge or notice of its contents—unless he knew or believed that such paper could be properly or justly characterized as obscene, lewd and lascivious. The statute is not to be so interpreted. The inquiry under the statute is whether the paper charged to have been obscene, lewd and lascivious was in fact of that character; and if it was of that character, and was deposited in the mail by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one which the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume, if the belief of the accused as to what was obscene, lewd and lascivious was recognized as the test for determining whether the statute has been violated. Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd and lascivious.

Another contention of the accused is, that the paper alleged to have been mailed was sent in response to a decoy

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letter, and, for that reason, no crime was committed. It is only necessary to say that that question has been disposed of adversely to the defendant's contention by *Grimm v. United States*, 156 U. S. 604, 611. In that case it was said: "The law was actually violated by the defendant; he placed letters in the postoffice which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person who should actually receive those letters, no matter what his name; and the fact that the person who wrote under those assumed names, and received his letters was a government detective, in no manner detracts from his guilt." That doctrine was again announced in *Goode v. United States*, 159 U. S. 663, 669, in which case it was said, that "certain prohibited pictures and prints were drawn out of the defendant by a decoy letter written by a government detective, was no defense to an indictment for mailing such prohibited publications."

It is also assigned for error that the court left it to the jury to say whether the paper in question was obscene, when it was for the courts, as a matter of law, to determine that question. If the court had instructed the jury as matter of law that the paper described in the indictment was obscene, lewd and lascivious, no error would have been committed; for the paper itself was in evidence; it was of the class excluded from the mails, and there was no dispute as to its contents.

It has long been the settled doctrine of this court that the evidence before the jury, if clear and uncontradicted upon any issue made by the parties, presented a question of law, in respect of which the court could, without usurping the functions of the jury, instruct them as to the principles applicable to the case made by such evidence. *Pleasant v. Faut*, 22 Wall. 116, 121; *Montclair v. Dana*, 107 U. S. 162; *Marshall v. Hubbard*, 117 U. S. 415, 419; *Smyth & Hansen v. United States*, 156 U. S. 51, 99, 100. Even if we should hold that the court ought to have instructed the jury, as a matter of law, that the paper was, within the meaning of the statute, obscene, lewd and lascivious, it would not follow that the judgment should, for that reason, be reserved, because it is clear that no injury came to the defendant by submitting the question of the character of the paper to the jury. But it is proper to add that it was competent for the court below, in its discretion, and even

if it had been inclined to regard the paper as obscene, lewd and lascivious, to submit to the jury the general question of the nature of the paper, accompanied by instructions indicating the principles or rules by which they should be guided in determining what was an obscene, lewd, or lascivious paper, within the contemplation of the statute under which the indictment was framed. That is what the court did when it charged the jury that "the test of obscenity is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influence, and into whose hands a publication of this sort may fall." "Would it," the court said, "suggest or convey lewd thoughts and lascivious thoughts to the young and inexperienced?" In view of the character of the paper, as an inspection of it will instantly disclose, the test prescribed for the jury was quite as liberal as the defendant had any right to demand.

Other questions are discussed in the elaborate brief filed for the defendant. Some of them do not require notice; others were not sufficiently saved by exceptions, at the proper time, and will not, therefore, be considered or determined.

We find no error of law in the record, and the judgment is affirmed.

Mr. Justice WURRE, with whom concurred Mr. Justice SHIRAS, dissenting.

Mr. Justice Shiras and myself are unable to concur in the opinion and judgment of the court. Thinking, as we do, that the consequence of the affirmance of the judgment is to deprive the accused of rights guaranteed to him under the Constitution of the United States, we are impelled to state the reasons for our dissent.

It was claimed at the bar of this court that the indictment was absolutely void, because it failed to set forth an offense against the law of the United States. This contention rested on two propositions: First, that the indictment did not, on its face, contain a statement of the obscene matter charged to have been illegally mailed; second, because, even if the failure to so state was excused by the allegation in the indictment, that the matter was too obscene and offensive to be repeated; the indictment was none the less absolutely void, because it

failed to give an identifying reference to that which the grand jury found to be obscene.

If these objections be well founded, they are necessarily apparent on the face of the record. They go to the jurisdiction of the court *ratione materiae*. They consequently demand consideration whether or not they were presented to the court below, or have been regularly assigned for error here. *Montana Railway Co. v. Warren*, 137 U. S. 348, 351. The questions, then, are:

First. Was it necessary to spread the matter alleged to be obscene in full in the indictment, and was the failure to do so excused by the allegation in the indictment that it was too offensive to be put on the record?

It is unquestioned that the English rule requires, where obscene words are relied upon, that the obscene matter should be set out explicitly in the indictment, and that the averment that it is too obscene to be so stated is insufficient to excuse the omission. *Regina v. Bradlaugh*, 3 Q. B. Div. 621. But this is not the doctrine of the American courts. At the time *Regina v. Bradlaugh* was decided the contrary rule had been announced in several leading cases in this country, and the court in the Bradlaugh case said: "In support of this contention for the Crown some American cases were cited. Decisions in the courts of the United States are not binding authorities, and although they may be expressly in point, yet, if they are contrary to our law, they must be disregarded." The cases thus referred to have since been followed by many other American authorities, so that the question may be considered in this country as determined adversely to the English rule. *Commonwealth v. Holmes*, 17 Mass. 336; *Commonwealth v. Tarbox*, 1 Cush. 66; *People v. Girardin*, 1 Michigan, 90; *State v. Pennington*, 5 Lea, 506; *McNair v. People*, 89 Illinois, 441; *Fuller v. People*, 92 Illinois, 182; *State v. Brown*, 27 Vermont, 619; *State v. Griffin*, 43 Texas, 538; *State v. Smith*, 17 R. I. 371; *Commonwealth v. Dejeardin*, 126 Mass. 46; *Commonwealth v. Wright*, 139 Mass. 382; *Commonwealth v. McCance*, 164 Mass. 162; *United States v. Bennett*, 16 Blatchford, 338. It was with reference to this well settled view that in *Grimm v. United States*, 156 U. S. 604, in speaking of sending obscene matter through the mails, the court said (p. 608): "The charge is not of sending obscene matter through the mails, in

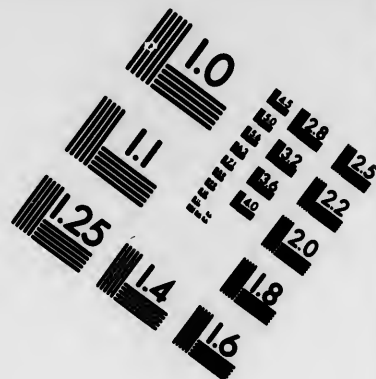
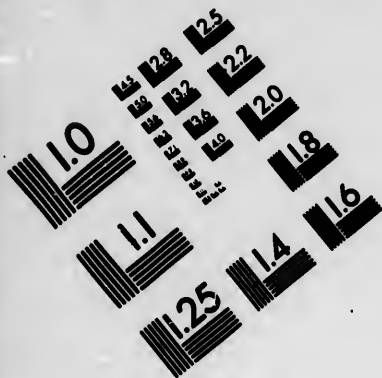
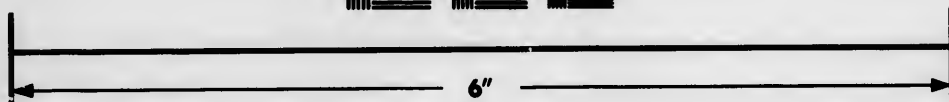
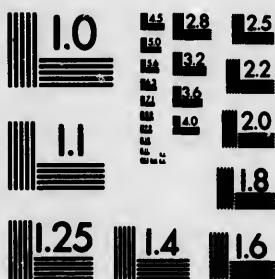


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which case some description might be necessary, both for identification of the offense, and to enable the court to determine whether the matter was obscene, and, therefore, non-mailable. Even in such cases it is held that it is unnecessary to spread the obscene matter in all its filthiness upon the record; it is enough to so far describe it that its obnoxious character may be discerned."

Second. Where the obscene matter is not spread upon the face of the indictment, and is excused under the averment that it would be offensive to morality to do so, is the indictment valid where it gives no specific reference identifying the matter found by the grand jury to be obscene, thus rendering it impossible to determine upon what the grand jury based its presentment?

In considering this question it must be borne in mind that imprisonment at hard labor in the penitentiary is the penalty which may be imposed for sending obscene matter through the mails; hence the offense is an infamous one. *Mackin v. United States*, 117 U. S. 348; *Ex parte Wilson*, 114 U. S. 417; *In re Claasen*, 140 U. S. 200. It must also be considered that, being an infamous offense, the prosecution can, under the Fifth Amendment of the Constitution, only be by indictment. The necessity for identifying references in the indictment, to the obscene matter upon which the grand jury makes its finding, is an essential part of the rule, dispensing with the obligation of stating the obscene matter, in so many words, in the indictment. The reason upon which the English rule rests is that spreading in full the obscene matter is essential to protect the accused in his rights, to enable him to move to quash, or in arrest of judgment, or to present on review by error the validity or invalidity of the indictment. The American rule is based upon the reason that such spreading upon the record is not essential to protect the rights of the accused, because the obscene matter, passed on by the grand jury, can be so identified by a reference to it in the indictment as to enable it to be, by bill of particulars or otherwise, readily supplied for all the purposes of defense; hence, the omission deprives the accused of no substantial right, whilst subserving the ends of public morality and decency.

The authorities make this clear. Thus, in *Grimm v. United States*, *ubi sup.*, the court said: "It is enough to so far describe it (obscene matter), that its obnoxious character may

be discerned." And the reason which exacted this reference was declared to be "both for identification of the offense and to enable the court to determine whether the matter was obscene, and, therefore, non-mailable." In *Commonwealth v. McCance*, *supra*, the indictment charged the accused with "selling a certain book then and there called 'The Decameron of Boccaccio,' and which said book upon the title page thereof was then and there of the tenor following (describing the title page), * * * which said book then and there contained, among other things, certain obscene, indecent and impure language, * * * which said book is so lewd, obscene, indecent and impure, that the same would be offensive to the court and improper to be placed upon the records thereof." The court, whilst fully recognizing the rule which renders it unnecessary to spread obscene matter in the indictment, also applied the principle which holds that where such matter is not put upon the record, there must be an identifying reference in the indictment, so that it may be determined from the face thereof what was the particular matter upon which the grand jury acted. In consequence of so holding, the judgment was reversed and the verdict set aside. See also, *Babcock v. United States*, 34 Fed. Rep. 873.

Indeed, the correctness of the ruling in *Commonwealth v. McCance*, we think results from the very nature of things. It being unquestionable that a grand jury must find an indictment in order that the prosecution be valid, how can it be said that there has been such a presentment, when on the very face of the record it is absolutely impossible to determine what matter the grand jury charged to be obscene? To say that it can be supplied by a bill of particulars or otherwise is a misconception, for it becomes impossible to supply that which does not legally exist. The constitution requiring that the grand jury should find the indictment, neither the court, the prosecuting officer nor any one else have power to create the necessary averments to make that an indictment which otherwise would be no indictment at all. This case illustrates the danger of departing from constitutional safeguards. The general rule requires an indictment to be specific. *Stephens v. State*, Wright (Ohio), 73; *Commonwealth v. Gillespie*, 7 S. & R. 496; *Commonwealth v. Stow*, 1 Mass. 54; *Commonwealth v. Bailey*, 1 Mass. 62; *Commonwealth v. Sweeney*, 10 S. & R. 173;

Commonwealth v. Wright, 1 Cush. 46; *Commonwealth v. Tarbox*, 1 Cush. 66; *Commonwealth v. Houghton*, 8 Mass. 107; *King v. Beere*, 12 Mod. 219; *State v. Parker*, 1 D. Chipman (Vermont), 298; see, also, *Commonwealth v. Stevens*, 1 Mass. 203. To this rule there has been evolved an exception. This exception, as we have said, is that where the publication or mailing of obscene matter is charged by a grand jury, such matter need not be stated in the indictment, provided in that instrument it be referred to and identified. Under the ruling now announced, it seems to us that the exception is made to destroy the rule, and that an indictment is held to be valid even although it makes no reference whatever to the matter relied on to show guilt. Thus the qualification as to the identifying reference by which alone the exception is justified, disappears, and the result logically leads to the recognition of the right of a grand jury to present, without stating or referring to the facts upon which its presentment is made, and also concedes the power of a prosecuting officer to supply matter in an indictment, and thus make that which is absolutely void a valid instrument. The wisdom of the rule announced in *Commonwealth v. McCance* was well illustrated by the indictment presented in that case, as it is by the alleged indictment under consideration here. Will it be said that an indictment which charged that an accused published obscene matter contained in twenty volumes of books called the Encyclopædia Britannica of Americana, giving the title page, and followed by the statement that a more minute description would be offensive to morality, would be adequate? And yet what difference would exist, except in degree, between such an indictment and the one here held to be valid? Nor is it logical to say that as an accused has no right to know the secrets of a grand jury room, therefore he is not entitled to be informed as to the matter upon which the grand jury bases its presentment. The Constitution forbids in a certain class of cases prosecution except by indictment, and, therefore, to the extent that such knowledge is essential to constitute a valid instrument, the accused is entitled, under the Constitution, to know the secrets of the grand jury room.

If these views as to the necessity of an identifying reference, supported, as we think they are, by the statement of the court in *Grimm v. United States*, and the ruling of the Supreme

Court of Massachusetts in *Commonwealth v. McCance*, be sound, their application to this case is clear.

The language of the indictment, whilst it identifies the paper as an entirety, fails in any degree to designate what matter therein, whether words or picture, was found to be obscene by the grand jury, and upon which their presentment was made. It is impossible from the mere description of the title page of the paper, and the averment that it contains twelve pages and was published on a particular day, to in any way ascertain what part, whether pictures or print, contained in the twelve pages, was acted on by the grand jury. In other words, using the identification of the paper given by the indictment, the mind looks in vain for any reference to the particular things, found in the paper, which were considered as within the statute.

Nor can it be correctly said that the alleged indictment under consideration charged that each and every part of the newspaper was obscene, and therefore the grand jury found the whole paper was of that character, thus identifying the whole.

It will be seen, from an examination of the indictment, that its language expressly charges that only portions of the publication to which it refers are obscene. The paper to which the indictment relates is twelve pages of the ordinary size of illustrated papers, with a title page as described in the indictment. Three of its pages are devoted to advertisements; all the other pages, except the sixth and seventh, contain pictures and printed matter. The excepted pages contain only pictures, which are blackened over in part so as to seemingly conceal them, and yet leaving enough unblackened to suggest the subjects which they depict. The eighth page has similar pictures along with the printed matter. After describing the title page of the paper and the picture thereon, the indictment says, "and the said paper consists of twelve pages, minute description of which, with the pictures therein and thereon, would be offensive to the court and improper to spread upon the records of the court, because of their obscene, lewd and indecent matters." This is not an allegation that the entire contents of the publication were obscene, because if that was intended there would be no necessity of referring to a "minute description" of the paper as essential to disclose the obscene matter. It can,

reasonably, only bear the construction that the publication was claimed to be obscene because of "obscene, lewd and indecent matters" appearing somewhere in the publication. It is evident, therefore, that particular matter contained in the twelve pages was contemplated, and that the indictment furnishes no means for ascertaining in what this matter consists, by reference or otherwise.

It is clear that the defenses here advanced, if they be well founded, assert not that the indictment is formally defective, but that it fails on its face to state an offense. The defect is therefore not one of form under Rev. Stat. § 1025. On both principle and authority such error goes to the existence of the indictment, and consequently is essentially one of substance. *Ex parte Bain*, 121 U. S. 1. This is especially applicable to a case where, by the Constitution, the accused can not be prosecuted except on presentment by a grand jury. That the mere silence or acquiescence of the accused can not deprive him of his constitutional right is obvious. In *Hopt v. Utah*, 110 U. S. 574, speaking through Mr. Justice Harlan, the court said (579):

"We are of the opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirements as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view, as well of the relations which the accused holds to the public, as of the end of human punishment. 'The natural life,' says Blackstone, 'can not legally be disposed of or destroyed by an individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority.' (1 Bl. Com. 144.) The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty can not be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses

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of the same kind. (4 Bl. Com. 11.) Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the Legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial; that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

Doubtless it was like reasoning which caused the court in *Commonwealth v. Maher*, 16 Pick. 120, to refuse, in a capital case, to allow an amendment as to a matter of substance, even with the consent of the prisoner, and which also made the court in *Commonwealth v. McCance* set aside the verdict against the accused. In accord with this view is the doctrine which denies the power, even by statute, to authorize amendments which substantially change an indictment. The result of the authorities to this effect is thus stated by Bishop: "If, in a case where the Constitution gives the defendant the right to be tried by an indictment, the Legislature should undertake to authorize such amendments as leave the indictment no longer the finding of the grand jury, an amendment under it would oust the jurisdiction of the court, and the cause must stop. Such is the substance of the authorities, though the doctrine is not always stated in these words." (1 Bish. New Crim. Pro., § 97, p. 55, and authorities there cited; Whart. Crim. Pl. & Prac., § 90, sub. 2, and authorities there cited.) The legislative authority not being competent to authorize an amendment so as to convert a void into a valid indictment, surely a prosecuting officer can have no such power.

The indictment, being, as we think, fatally defective in failing to state an offense, which defect could not be supplied in the court below, and can not be so supplied here without converting an absolutely void into a valid indictment, and thus violating the Constitution, which secures the accused an immunity from prosecution except upon presentment by a grand jury, the verdict and judgment should be reversed.

STATE V. PLANT.

(97 Vt. 454.)

DISORDERLY HOUSE: *Indictment—Proof—Election—Reputation—Reversible error.*

1. Under an indictment of a single count charging the keeping of a house of ill fame between certain days at a certain town, it was error to admit proof that respondent had kept such a house during such time at more than one place in said town.
2. On a prosecution for keeping a house of ill fame, under the statute making penal the keeping of "a house of ill fame, resorted to for the purpose of prostitution or lewdness," it was material error, in the absence of a showing that respondent was not prejudiced, to admit proof that the character of the house was reputed to be bad.

Exceptions from Caledonia County Court; Tyler, Judge.
Elizabeth Plant was convicted of keeping a house of ill fame,
and excepts. Reversed.

Henry C. Bates, State's Attorney, for the State.
Dunnett & Nelson, for respondent.

ROWELL, J. The prisoner is informed against in one count for keeping a certain house of ill fame at St. Johnsbury, on such a day, and on divers other days and times between that day and the day of the filing of the information. On trial the State first introduced evidence to prove the keeping of such a house in a certain building on a certain street in the village of St. Johnsbury, within the time alleged. It was then allowed to introduce evidence to prove the keeping by the prisoner of two other such houses on a certain other street in said village, at different times before the time alleged, and the keeping of one of them again after the keeping of the one first mentioned, within the time alleged, and to use such evidence as further and substantive ground for conviction, on the theory that the crime is cumulative to an extent to warrant that. Now, the gist of this crime is the keeping of the house; and, although the crime may have continuance by the repetition of the conduct that gives character to the house, yet that continuity may be broken, so that separate and distinct offenses will be

committed; and it is thus broken when the business is given up at one place, and resumed at another and a different place, for then the keeping of the former house is completed and ended, and, as the keeping is the gist of the crime, the crime itself is equally completed and ended, and the resumption of the business at the other place is a separate and distinct keeping, and so a separate and distinct crime, and there are as many crimes as there are separate and distinct keepings of separate and distinct houses, and, for the purposes of this case, we will say at separate and distinct, though successive, times. There is nothing in the nature of the offense opposed to this view, which is supported by *State v. Lee*, 80 Iowa, 75, 45 N. W. 545, which was an indictment in one count for keeping a house of ill fame. During the trial the prisoner asked that the State be compelled to elect whether it would proceed on the theory that the house of ill fame was located in the first story of the building occupied by the prisoner or the second story; but it was held that all the rooms were properly treated as constituting but one building, and that, therefore, the court properly refused to compel the State to elect.

A house of ill fame is a nuisance at common law, for it holds out allurements to a miscellaneous and common bawdry, corrupting to the public morals; and nuisances, though successive and alike in kind, are distinct in offense. A man erects a nuisance on a public street, and continues it there for a time. He commits an offense. He abates that nuisance, and straightway erects another like it on another street. He commits another offense. But it is said that *State v. Nixon*, 18 Vt. 70, is opposed to the view we take. That was an indictment in one count for keeping a house of ill fame at Burlington, on such a day, and on divers other days and times between that day and the day of taking the inquisition. On motion in arrest, it was objected that the indictment was insufficient, for that the local situation of the house was not stated, nor even sufficiently alleged to be in any town or county. The court said that the offense is local, and must be described as committed in a particular town, and that the State is confined in its proof to that town, and can not prove an offense anywhere in the county, and that a more particular description of the house was not required. This decided the point, but the court went on to say that a conviction on the indictment would be a bar to any other

prosecution for keeping a similar house in the same town during the time alleged. No reason is given for this, but it seems to indicate that the court thought that the keeping of a similar house in the same town during the time alleged would be but part and parcel of the offense for which conviction was had. If this is what the court meant, we do not agree with it, for the reasons we have given.

As there was but one count in the information in the case at bar, there could be a conviction of only one offense; and, as the State's testimony tended to show several offenses, it should have been put to elect for which it would go, and it was error to allow it to go for all as one offense.

The statute makes penal the keeping of "a house of ill fame, resorted to for the purpose of prostitution or lewdness." In some of the states similar statutes are construed to require proof that the house had an ill fame in order to convict. That construction has prevailed to some extent in this state at *nisi prius*; but we regard it as illogical and unsound. It amounts to saying that, however bad the house is in point of fact, it is no offense under the statute to keep it if it has not an ill fame. This is keeping clean the outside of the house, while the inside is full of prostitution and lewdness. Certain ancient sects did like things, and a woe was pronounced upon them for it by the highest authority. The words "ill fame" are used in the statute to give name and character to the house, and do not refer to its reputation. Both at common law and in common parlance the words "house of ill fame" mean a house resorted to for the purpose of prostitution; and hence, to say of one that he keeps a house of ill fame, without more, is to charge the exact offense punished by the statute, and is actionable *per se*; and an *inuendo* that an accusation of the crime of keeping a house of ill fame was thereby meant is sufficient, without using the remaining words of the statute. *Posnett v. Marble*, 62 Vt. 481. The gist of the offense is the keeping of the house, irrespective of its fame. The statute aims at the fact, not the fame; at the substance, not the shadow. It follows, therefore, ill fame of the house not being an element of the offense, that it was not only unnecessary to prove it, but that evidence of it was irrelevant to any issue involved, for all the cases hold that the character of the house can not be shown by proof of its reputation; for that purpose the testimony is mere hearsay.

It is unnecessary to refer at length to the authorities on this question. We think the weight of judicial opinion sustains the view we take. A pretty full discussion of the subject will be found in *Henson v. State*, 62 Md. 231, 50 Am. Rep. 204 and note; and in *State v. Lee*, 80 Iowa, 75.

But it is said that if it was not necessary to prove ill fame, and evidence of it was irrelevant, the prisoner was not harmed by it, for that its only effect was to impose an unnecessary burden on the State, which helped rather than harmed the prisoner. Although irrelevancy alone is not cause for reversal, but the testimony must have been such that it might prejudice the excepting party on an issue involved (*Boutelle v. Fire Ins. Co.*, 51 Vt. 4), and although, presumably, the court tried to confine this testimony to the question of reputation, yet it is so often true that reputation is, to the common mind at least, indicative that the fact is as reputed to be, that we can not say the prisoner was not harmed by the testimony. Indeed, we think it more likely that she was harmed than that she was not. It certainly is not clear that she was not, as it must be, in order to make the error non-reversible.

A woman, called as a witness by the State, testified to having seen a man on the bed with the prisoner in her house. On cross-examination, after having testified to the condition of the bed, and that they were on it and dressed, she was asked what they were doing, and replied, "Ask them." She was again asked, and replied, "I am not obliged to tell." She was again asked, whereupon the court said it saw no occasion for pressing inquiry further in that direction, and prohibited it. Although cross-examination is a right, yet the court may control the exercise of it to any extent that does not infringe the right itself. This control is often exercised, and never more properly than in prohibiting details that may be offensive when intimation and suggestion will convey the meaning of the witness just as well. Whether in this case the meaning of the witness had been sufficiently conveyed, and her credibility sufficiently tested, when the cross-examination was stopped, is difficult to tell. Some of us think they had not been, and that the right of cross-examination was infringed; while others think we can not say that, because the trial court saw the witness and noted the attendant circumstances, and so

could judge better than we can when the examination had gone far enough to accomplish its legitimate ends.

There is no need of considering the other points of exception, as the questions raised are largely eliminated by the holding on the second point considered, and the remainder do not inhere in the case at all, and can scarcely again arise. Exceptions sustained, judgment reversed, verdict set aside, and cause remanded for a new trial.

NOTE.—Resort for immoral persons.—A prosecution for the common-law offense of keeping a disorderly house may be sustained by proof that such house was resorted to by immoral persons for the purpose of prostitution, without evidence that it was otherwise disorderly. *Com. v. Goodall*, 105 Mass. 588. Knowlton, J., dissenting.

Indictment—Two offenses.—An indictment alleging that defendant did keep and maintain a disorderly house, and a house where lewd persons did resort, does not state two offenses. *State v. De Ladson*, 66 Conn. 7.

Disorderly conduct.—City ordinance providing a punishment for disorderly conduct is valid, in so far as it does not conflict with state law. *State v. Sherard*, 117 N. C. 716.

To call one a "damned highway robber," in a public restaurant, in a voice so loud as to be heard on the street, is properly punishable under a city ordinance prohibiting disorderly conduct. *Id.*

BELL V. STATE.

(72 Miss. 507.)

DYING DECLARATIONS: *When not admissible.*

1. Where it appears the wounds inflicted on deceased were not so apparently serious as to impress on him, or those who saw him, the fact that they were fatal, and that he had no medical attendance, nor any one to acquaint him with the nature of his injury, his declarations were held to be inadmissible, notwithstanding his wife testified that he had stated that he was about to die.
2. It is error to admit alleged dying declarations without full inquiry into all the circumstances under which they were made, and an examination of all witnesses able to throw light on the matter.

Appeal from the Circuit Court, Perry County; Hon. S. H. Terral, Judge.

E. J. Bell, convicted of murder, appeals. Reversed.

M. U. Mounger and Southworth & Stevens, for appellant.
Frank Johnson, Attorney-General, for the State.

COOPER, C. J. The circumstances of the homicide were not such as to make competent evidence of the character of the deceased for peace or violence. That he was of good or evil repute, or irascible, quarrelsome, or given to broils, would throw no light upon the character of the homicide, in view of the evidence. *Spivey v. State*, 58 Miss. 858.

The testimony of the wife of the deceased, in which is detailed his supposed dying declaration, was improperly admitted. Repeated examinations of the record deepens our conviction that the court should have required a full and careful disclosure of the circumstances under which the declarations were made, and of the facts going to show that the declarations were made by the deceased under that solemn and settled conviction of impending death which is alone recognized by law as the equivalent of the oath of the person by whom they are made. The question of the admissibility of dying declarations is to be decided by the court, and, when offered in evidence, it is "the duty of the court to fully investigate the circumstances under which they were made, with the view of ascertaining whether they are admissible in evidence as such, under the rules of law with respect to that sort of evidence." *Owens v. State*, 59 Miss. 547.

Mr. Greenleaf states the principles under which this character of evidence is controlled as follows: "It is essential to the admissibility of these declarations, and is a preliminary fact, to be proved by the party offering them in evidence, that they were made under a sense of impending death; but it is not necessary that they should be stated, at the time, to be so made. It is enough if it satisfactorily appears in any mode that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinion of his medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are to be resorted to in order to ascertain the state of the declarant's mind. The length of time which elapsed between the declaration and the death of the declarant furnishes no rule for the admission or rejection of the evidence, though, in the

absence of better testimony, it may serve as one of the exponents of the deceased's belief that his dissolution was or was not impending. It is the impression of almost immediate dissolution, and not the rapid succession of death, in point of fact, that renders the testimony admissible. Therefore, when it appears that the deceased at the time of the declaration had any expectation or hope of recovery, however slight it may have been, and though death actually ensued in an hour afterward, the declaration is inadmissible. On the other hand, a belief that he will not recover is not in itself sufficient, unless there be also the prospect of almost immediate dissolution." 1 Greenl. Ev. § 158. We have no doubt that the wounds inflicted by the appellant on the head of the deceased with the ax caused his death. But this is not the question involved. The true inquiry is whether the deceased, at the time he made the declaration, believed that these injuries would certainly result in his speedy death. It appears from the testimony of Mr. McSwain, at whose house the homicide occurred, that the deceased was struck thrice on the head, "one wound back of the head, the scar of which was almost one inch wide, and three inches long," which looked as though "it might have been made with the poll of the ax. There was a scar in the top of the head, as if made with the eye of the ax, and a chop in front, on the forehead, as if made with the blade of the ax." The witness Henlon, who saw the deceased after his death, gave substantially the same description of the wounds, except the one on the forehead, which he says "cut through the skull, and I could see something like the brain in there." No other witness thus describes the wound on the forehead, and, in view of all the evidence, we do not think the court would have been warranted in finding as a fact that such was the character of that wound, known to the deceased. It is not suggested in the evidence of those who, immediately after the injury, saw the deceased, that the blows deprived him, even temporarily, of consciousness. He remained at the house of Mr. McSwain that night, and said nothing to him indicating that he believed the wounds would result in death. McSwain says: "He did not say anything about dying, that I heard. He asked me if I would sell him some meat for his family, and risk his getting well, to pay me for it; and I would not do it." Perkins, another witness for the State, testified that he was with the de-

ceased during the night, and heard him say nothing of dying, except that "Bell had almost killed him." This witness also testified that he "went home with deceased the next day, and stayed with him most of the time. Never heard him say anything about dying, that I now remember."

It does not appear that deceased had any medical attention; that his wounds were examined by any one, and their gravity explained to him; that anything was said to him by any one calculated to impress him with the conviction that his condition was serious, much less a hopeless one. His declarations were proved by the testimony of his wife, who, over the objection of the defendant, was permitted to testify. She said: "I saw John when they brought him home the next day (Thursday) after he was hurt. He told me when they brought him home that he was bound to die, and he knew it, for he said: 'I can't live but a few days. I know Ed Bell has killed me. Will die in a few days.' He told me that when he first got home and lay down on a pallet. He told me what to do, and said: 'I know I will die in a very few days, for I can't live this way. Ed Bell has killed me. I know it.'" The bill of exceptions continues: "Here the district attorney asked the witness whether John Powe made any statements to her about the difficulty, before he died, and, if so, to state what they were." The defendant objected to the introduction of the statements, for the reason that no facts had been shown to make the declaration competent. The objection was overruled, and the witness, testifying, said: "John Powe, after telling me he was bound to die, said that he and Bell started to get some stove wood, and he had the light and Bell the ax; and Bell told him to pick up some stove wood, and take it in the house, and he said to Bell, 'No, let us wait, and take the wood in the house in the morning;' and Bell said, 'No, let us take it in to-night;' and John said he stooped down to get the wood, and Bell struck him with the ax, and he never knew anything more for some time, when he was somewhere else. There were several persons present, I think, when John made this statement. They brought him home in an ox wagon. He began telling me about going to die while in a chair, waiting for the pallet to be made, and finished about how it was after he lay down. We had to hold him up in a chair and lay him down. Some of the

parties who were present live in Green county, and some live in Alabama. John did not tell us to buy meat from Mr. McSwain on credit, and tell him he would pay for it when he got well, for he said he was going to die all the time. Will Perkins was there when John was telling me, and I reckon he heard him."

The gravity of the issues involved in that class of cases, in which alone this character of hearsay evidence is admissible, the fact that the defendant is deprived of the opportunity of cross-examination, that the declaration is usually that of a hostile party, and is very generally proved by the testimony of his friends or relatives, has justly caused the courts to restrict its admissibility within well-defined limits, and to require clear proof of those conditions, the existence of which are essential to its competency. The sincere and settled belief of impending dissolution, the absence of all hope, however slight, can alone give to the declaration that sanction which is attributed to the testimony of the living by the solemn oath, judiciously administered. The means by which this essential fact shall be established are not so important as the clearness of the proof, whatever may be the evidence by which the proof is made. It is not necessary that the declarant shall aver that he believes death to be certain and impending. *People v. Simpson*, 48 Mich. 474; *Ward v. State*, 78 Ala. 441; 1 Greenl. Ev. 158; *Com. v. Matthews*, 89 Ky. 287; *Donnelly v. State*, 26 N. J. Law, 463; *Tip v. State*, 14 Lea, 502. On the other hand, the mere fact that the declarant stated that he would die does not necessarily establish that he was without hope, and expected a speedy dissolution. Much depends upon the circumstances of such statements. Exclamations of despondency or from pain, though they may be in language which, under other circumstances, would be appropriate to express settled despair and hopelessness, may, and often do, indicate far less. To give to words, which the observation of mankind teaches are frequently used in a different sense, an inflexible significance, even though it be a natural one, would be to do violence to the plain dictates of common sense, and would often result in serious injustice.

Words are but the exponents of thought, and the effort must be to determine whether, in the particular instance, the thought suggested by their use was that of the speaker. The

deceased here had received wounds from which he doubtless died, but their immediate effect seems not to have been sufficiently serious to impress upon him or those who saw him the fact that they were of a fatal character. Before leaving the house of Mr. McSwain, he asked him to sell on credit food for his family, and "risk his getting well to pay for it." He said nothing to the State's witness Perkins during the night of the injury, nor the next day, while being carried home, indicating the slightest apprehension of death. When carried into his house and placed on a chair, and at that time meeting for the first time his wife, in what seems to have been an ebullition of despondency, he used language describing his condition, which, under other circumstances, might have indicated an utter absence of all hope of recovery, and a fixed apprehension of immediate death. But the question returns whether this language, under the circumstances, so certainly indicates that mental condition requisite to make what he then said a dying declaration as to justify its introduction in evidence against one being tried for his life, without at least further and more extended examination of other witnesses then present. Perkins, who was present at the time, either did not hear what was said, or the manner of the declarant did not impress him as being that of a man dying, or who believed himself destined to an early death. Not only is this true, but throughout the following days during which he remained with him, this witness heard from the deceased no expression indicating an apprehension of death. Others were present at the time and afterward, but no one of them was called upon to testify either to the declarations or to facts tending to show the physical or mental condition of the deceased. Admitting the truth of all that the wife stated, it was at least left in doubt whether the statement of the deceased that he would die from his wounds expressed and clearly proved a hopeless and fixed condition of mind, or but showed a momentary despondency springing from the pain of meeting his family. We think it clear that the court should at least have required a full development of all the circumstances, and from other witnesses, if necessary, and from such investigation should have determined the existence of that settled feeling of hopelessness on the part of the declarant before admitting his statement as a dying declaration. *In favorem vitae* all doubt should be re-

solved against the State and in favor of the accused. Judgment reversed.

NOTE.—Admissible when cause of death uncertain.—Where the evidence is conflicting as to whether deceased was killed by a blow in the stomach inflicted by defendant with an axe, or whether defendant struck him only on the arm, and he died from other causes, dying declarations by deceased that defendant killed him by a blow in the stomach with an axe are admissible. *Clark v. State*, 105 Ala. 91.

Made under sense of impending death.—The evidence showed that deceased told the doctor "that the rim of his stomach was broken, and that he would not get over it;" that the doctor told him he was very near death; and that an hour afterwards he died: *Held*, that declarations made by the deceased after this conversation were made under the sense of impending death. *Id.*

Same.—Where a witness testified that deceased told him that he expected to die, and that he could not get well, testimony that deceased immediately thereafter told witness that defendant shot him, is admissible as a dying declaration. *Cole v. State*, 105 Ala. 76.

Same.—Statements of deceased are inadmissible as dying declarations on a mere showing that at the time he "appeared to be suffering, and was praying." *Id.*

Same.—Where deceased, after he had been shot, was informed that there was no chance for his recovery, and in response thereto exclaimed, "Oh, my God, must I die!" and said, "Give me some water, if I have got to die," his belief that he was about to die was sufficiently established to admit his statements as to the cause of the shooting as dying declarations. *Com. v. Brewer*, 164 Mass. 577.

Jury may pass upon question.—Though the judge admitted certain statements as dying declarations, it was proper to instruct the jury that they should reject said statements if they found that deceased had any hope of recovery at the time they were made. *Id.*

Statements of the deceased as to matters other than the circumstances surrounding the homicide, or expressions of belief as to matters not within the knowledge of the dying man, are inadmissible. *Whart. Cr. Ev.* § 294; *State v. Footyou*, 24 Or. 61, 32 Pac. 1031, and 33 Pac. 537; *State v. Chambers*, 87 Mo. 406; *Matherly v. Com.* (Ky.), 19 S. W. 977; 1 Greenl. Ev. § 159. The rule, as stated by Greenleaf, is, "The declarations of the deceased are admissible only of those things to which he would have been competent to testify if sworn in the cause." *State v. Gray*, 55 Kan. 135.

Attendant circumstances may be shown.—As showing the circumstances under which dying declarations were made, the prosecution may prove that a Catholic priest had been summoned for the declarant, and had performed in her behalf the last rites of the church. *Chicago Law Journal* (weekly), Vol. 2, p. 96.

Conversation—Allowing only part put in evidence, error.—Refusal to allow the defendant to prove what was said by him in a conversation with the deceased, which had already been put in evidence by the prosecution, is error. *Id.*

Impeachment—Contradictory statements admissible.—Contradictory

statements by the deceased at the time of making a dying declaration are admissible as tending to impeach the declaration, whether competent as dying declarations or not. The rule that, to impeach a witness by proof of contradictory statements, a foundation must be laid by asking him whether he made such statements, does not extend to the case of dying declarations. *Id.*

MOORE v. UNITED STATES.

(160 U. S. 263.)

EMBEZZLEMENT: *Meaning of term—Indictment—Allegation of capacity of accused when money was received by him.*

1. A count in an indictment which charges that the accused, "being then and there an assistant, clerk, or employe in or connected with the business or operations of the United States postoffice in the city of Mobile, in the State of Alabama, did embezzle the sum of sixteen hundred and fifty-two and fifty-nine one hundredths dollars, money of the United States, of the value of sixteen hundred and fifty-two and fifty-nine one hundredths dollars, the said money being the personal property of the United States," is defective in that it does not further allege that such sum came into his possession in that capacity.
2. The count having been demurred to, and the demurrer having been overruled, the objection to it is not covered by Rev. Stat., § 1025, and is not cured by verdict.
3. Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted, or into whose hands it has lawfully come; and it differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while, in larceny, the felonious intent must have existed at the time of the taking.

Error to the District Court of the United States for the Southern District of Alabama.

Plaintiff in error, late assistant postmaster of the city of Mobile, was indicted and convicted of embezzling certain moneys of the United States to the amount of \$1,652.59.

There were four counts in the indictment, to one of which a demurrer was sustained, and upon two others defendant was acquitted. The fourth count, upon which he was convicted, charged that "the said George S. Moore, being then and there an assistant, clerk, or employe in or connected with the

business or operations of the United States postoffice in the city of Mobile, in the State of Alabama, did embezzle the sum of sixteen hundred and fifty-two and fifty-nine one hundredths dollars (\$1,652.59), money of the United States of the value of sixteen hundred and fifty-two and fifty-nine one hundredths dollars (\$1,652.59), the said money being the personal property of the United States."

Moore having been sentenced to imprisonment at hard labor sued out this writ of error.

Mr. M. D. Wickersham and *Mr. W. H. McIntosh*, for plaintiff in error.

Mr. Assistant Attorney-General Whitney for defendant in error.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

Defendant was indicted under the first section of the act of March 3, 1875, "to punish certain larcenies, and the receivers of stolen goods," 18 Stat. 479, which enacts that "any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be deemed guilty of felony," etc.

The principal assignment of error is to the action of the court in overruling a demurrer to the fourth count of the indictment, which charges, in the words of the statute, that "the said George S. Moore, being then and there an assistant, clerk or employe, in or connected with the business or operations of the United States postoffice in the city of Mobile, in the State of Alabama, did embezzle the sum of ———, money of the United States, of the value of ———, the said money being the personal property of the United States."

Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny, the felonious intent must have existed at the time of the taking.

It is objected to the indictment in this case that there is no direct allegation that defendant was an assistant, clerk, or em-

ploye in, or connected with the business or operations of the postoffice at Mobile; that the money of the United States is not identified or described, and that there is no allegation that it came into the possession of the defendant by virtue of his employment.

The act in question has never been interpreted by this court, nor has our attention been called to any case where it has received a construction in this particular, except that of *McCann v. United States*, 2 Wyoming, 274, decided in the Territorial Supreme Court of Wyoming, in which the allegation was that "McCann, * * * at and within the district aforesaid, twenty thousand pounds of sugar * * * of the goods, chattels, and property of the United States of America, then and there being found, then and there feloniously and fraudulently did embezzle, steal, and purloin," etc. This allegation was held to be defective in charging a mere legal conclusion, "leaving it impossible to determine whether the offense was committed, and the conclusion correct." It was said that the indictment for this offense must set forth the actual fiduciary relation and its breach; that the indictment did not identify the offense on the record; and did not secure the accused in his right to plead a former acquittal or conviction to a second prosecution for the offense. It was held that the words "to embezzle," were equivalent to the words "to commit embezzlement," and that a count in the words of the statute was not sufficient; that "all the ingredients of fact that are elemental to the definition, must be alleged, so as to bring the defendant precisely and clearly within the statute; if that can be done by simply following the words of the statute, that will do; if not, other allegations must be used." The general principle here alluded to, has been applied by this court in several cases. *United States v. Carll*, 105 U. S. 611; *United States v. Cook*, 17 Wall. 168; *United States v. Cruickshank*, 92 U. S. 542.

In the case of *United States v. Northway*, 120 U. S. 327, the word "embezzle" was recognized as having a settled technical meaning of its own, like the words "steal, take, and carry away," as used to define the offense of larceny. In this case the allegation was that the defendant, "as such president and agent" (of a national bank) "then and there had and received in and into his possession certain of moneys and funds of said banking association, * * * and then and there being in,

possession of the said" defendant "as such president and agent aforesaid, he, the said" defendant, "then and there" * * * wrongly, unlawfully, and with intent to injure and defraud said banking association, did embezzle and convert to his * * * own use." In respect to this it was said to be quite clear that the allegation was sufficient, as it distinctly alleged that the moneys and funds charged to have been embezzled were at the time in the possession of the defendant as president and agent. "This necessarily means," said the court, "that they had come into his possession in his official character, so that he held them in trust for the use and benefit of the association. In respect to those funds, the charge against him is that he embezzled them by converting them to his own use. This we think fully and accurately describes the offense of embezzlement under the act by an officer and agent of the association."

In the case of *Claassen v. U. S.*, 142 U. S. 140, an allegation similar in substance and effect was also held to be sufficient. The indictment, said the court, "avers that the defendant was president of a National Banking Association; that by virtue of his office he received and took into his possession certain bonds, (fully described,) the property of the association; and that, with intent to injure and defraud the association, he embezzled the bonds and converted them to his own use. On principle and precedent, no further averment was requisite to a complete and sufficient description of the crime charged."

The cases reported from the English courts, and from the courts of the several States, have usually arisen under statutes limiting the offense to certain officers, clerks, agents, or servants of individuals or corporations, and the rulings that the agency or fiduciary relation must be averred, as well as the fact that the money embezzled had come into the possession of the prisoner in that capacity, are not wholly applicable to a statute which extends to every person, regardless of his employment, or of the fact that the money had come into his possession by virtue of any office or fiduciary relation he happened to occupy. These cases undoubtedly hold, with great uniformity, that the relationship must be averred in the exact terms of the statute; that the property embezzled must be identified with great particularity; and that it must also be averred to have come into the possession

of the prisoner by virtue of his fiduciary relation to the owner of the property.

Thus in *Commonwealth v. Smart*, 6 Gray, 15, it was held that an indictment which averred that the defendant "was intrusted" by the owner "with certain property, the same being the subject of larceny," (describing it,) "and to deliver the same to" the owner "on demand," and afterward "refused to deliver said property to said" owner, "and feloniously did embezzle and fraudulently convert to his own use, the same then and there being demanded of him by said" owner, was fatally defective, by reason of omitting to state the purpose for which the defendant was intrusted with the property, or what property he fraudulently converted to his own use. So in *People v. Allen*, 5 Denio, 76, under a statute limiting the offense to clerks and servants, it was held that a count charging the defendant with having collected and received certain money as the agent of an individual, was defective.

On the other hand, in *Lowenthal v. State*, 32 Alabama, 589, an indictment charging in the form prescribed by the code that the defendant, being agent or clerk of another, "embezzled, or fraudulently converted to his own use, money to about the amount of eighteen hundred dollars (\$1800) * * * which came into his possession by virtue of his employment," was sufficient. See, also, *People v. Tomlinson*, 66 California, 344; *Commonwealth v. Hussey*, 111 Mass. 432. It was held, however, in *State v. Stimson*, 4 Zab. (24 N. J. Law) 9, that it was not sufficient to describe the offense in the words of the statute, and that there should be some description either of the number or denomination of the coins and of the notes, and also an averment of the value of notes.

Indeed, the rulings in this class of cases became in some instances so strict, that statutes were passed in several of the States defining what should be necessary and sufficient in indictments for embezzlement. Thus, in the Criminal Code of Illinois, it is declared to be sufficient to allege, generally, in the indictment, an embezzlement, fraudulent conversion or taking, with intent to embezzle and convert funds of any person, bank, corporation, company, or copartnership, to a certain value or amount, without specifying any particulars of such embezzlement. Under this statute, it was held proper for the court to permit all the evidence of what the defendant did

by reason of his confidential relations with the banking firm, whose clerk he was, to go to the jury, and if the jury found, from the whole evidence, any funds or credits for money had been embezzled or fraudulently converted to his own use by defendant, it was sufficient to maintain the charge of embezzlement. "The view taken by the defense," said the court, "of this statute, is too narrow and technical to be adopted. It has a broader meaning, and when correctly read, it will embrace all wrongful conduct by confidential clerks, agents, or servants, and leave no opportunity for escape from just punishment on mere technical objections not affecting the guilt or innocence of the party accused." *Kerr v. People*, 110 Illinois, 627, 647.

The ordinary form of an indictment for larceny is that J. S., late of, etc., at etc., in the county aforesaid, (specifying the property,) of the goods and chattels of one J. N., "feloniously, did steal, take, and carry away." In other words, the whole gist of the indictment lies in the allegation that the defendant stole, took, and carried away specified goods belonging to the person named. The indictment under consideration is founded upon a statute to punish larcenies of government property. It applies to "any person," and uses the words "embezzle, steal, or purloin" in the same connection, and as applicable to the same persons and to the same property. There can be no doubt that a count charging the prisoner with stealing or purloining certain described goods, the property of the United States, would be sufficient, without further specification of the offense; but whether an indictment charging in such general terms that the prisoner "embezzled" the property of the government, (identifying it,) would be sufficient, we do not undertake to determine; although we think the rules of good pleading would suggest, even if they did not absolutely require, that the indictment should set forth the manner or capacity in which the defendant became possessed of the property.

For another reason, however, we think the indictment in this case is insufficient. If the words charging the defendant with being an employe of the postoffice be material, then it is clear, under the cases above cited, that it should be averred that the money embezzled came into his possession by virtue of such employment. Unless this be so, the allegation of employment is meaningless and might even be misleading, since

the defendant might be held for property received in a wholly different capacity—such, for instance, as a simple bailee of the government. In the absence of a statutory regulation the authorities upon this subject are practically uniform. Wharton's Crim. Law, § 1942; *Rex v. Snowley*, 4 Car. & P. 390; *Commonwealth v. Simpson*, 9 Met. 138; *People v. Sherman*, 10 Wend. 298; *Rex v. Prince*, 2 Car. & P. 517; *Rex v. Thorley*, 1 Mood. C. C. 343; *Rex v. Blakewell*, Russ. & Ry. 35.

On the other hand, if these words be rejected as surplusage and mere *descriptio personae*, then the property embezzled should be identified with particularity, the general rule in the absence of a statute being that an averment of the embezzlement of a certain amount in dollars and cents is insufficient. *Rex v. Furneaux*, Russ. & Ry. 335; *Rex v. Flower*, 5 B. and C. 736; *Commonwealth v. Sawtelle*, 11 Cush. 142; *People v. Bogart*, 36 California, 245; *People v. Cox*, 40 California, 275; *Barton v. State*, 29 Arkansas, 68; *State v. Thompson*, 42 Arkansas, 517; *State v. Ward*, 48 Arkansas, 36.

There are, undoubtedly, cases which hold that, where the crime consists, not in the embezzlement of a single definite quantity of coin or bills, but in a failure to account for a number of small sums received—a series of petty and continuous peculations—where it would be manifestly impossible, probably for the defendant himself, but much more for the prosecution, to tell of what the money embezzled consisted, an allegation of a particular amount is sufficient. These cases, however, are confined to public officers, or to the officers of corporations, and where the embezzlement consists of a single amount of property, the general rule above stated still holds good. The leading case upon this point is that of *People v. McKinney*, 10 Michigan, 54, 89. In this case the treasurer of the State of Michigan was charged with the embezzlement of four thousand dollars belonging to the State. It was held that, as the treasurer had by law the entire custody and management of the public money, with authority to receive such descriptions of funds as he chose, the public could exercise no control or constant supervision over him, and that it would be wholly impracticable to trace or identify the particular pieces of money or bills received by him, and hence, that the allegation of a certain amount was sufficient. This case has been followed by several others, and may be said to apply to all

instances where it would be impracticable to set forth or identify the particular character of the property embezzled. *State v. Munch*, 22 Minnesota, 67; *State v. Ring*, 29 Minnesota, 78; *State v. Smith*, 13 Kansas, 274, 294; *State v. Carrick*, 16 Nevada, 120; *United States v. Bornemann*, 36 Fed. Rep. 257. In some jurisdictions, however, notably in England, California, Louisiana and Massachusetts, the difficulty has been entirely remedied by statute. Greaves' Criminal Law, 156; *Rez v. Grove*, 1 Moody Cr. Cas. 447; *Commonwealth v. Butterick*, 100 Mass. 1; *Commonwealth v. Bennett*, 118 Mass. 443; *People v. Treadwell*, 69 California, 226; *State v. Thompson*, 32 La. Ann. 796.

If, then, the indictment in this case had charged that the defendant, being then and there assistant, clerk, or employe in or connected with the business or operations of the United States postoffice in the city of Mobile, embezzled the sum stated, and had further alleged that such sum came into his possession in that capacity, we should have held the indictment sufficient, notwithstanding the general description of the property embezzled as consisting of so many dollars and cents. But, if the words charging him with being in the employ of the government be stricken out, then there would be nothing left to show why the property embezzled could not be identified with particularity, and the general rule above cited would apply. The indictment would then reduce itself to a simple allegation that the said George S. Moore, at a certain time and place, did embezzle the sum of \$1,652.59, money of the United States, of the value, etc., said money being the personal property of the United States, which generality of description would be clearly bad. As there was a demurrer to this count, which was overruled, we do not think the objection is covered by Rev. Stat., § 1025, or cured by the verdict.

As we hold the indictment in this case to be bad, we find it unnecessary to consider the other errors assigned. The judgment of the court below is therefore reversed, and the case remanded, with directions to quash the indictment.

NOTE.—Ownership must be alleged.—In a prosecution for embezzlement under the statute of North Dakota, it is necessary to allege the ownership of the property embezzled, and prove the same as alleged. *State v. Collins*, 4 N. D. 433.

In this case the court says: "It is elementary that in all prosecutions

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for larceny the property stolen must be specifically set forth, and also the ownership of such property; and these allegations being necessary, both in indictments for larceny and embezzlement, it follows, as a matter of course, that proof of these allegations is also necessary."

Venue—Money embezzled without the state.—Under statute of Massachusetts providing that "the offense of embezzlement may be prosecuted and punished in any county in which the person charged had possession of the property alleged to have been embezzled," one embezzling property out of the state may be punished in any county of the state in which he has possession of the property. Knowlton, J., dissenting. *Com v. Parker*, 165 Mass. 526.

Indictment—Failure to allege that money embezzled belonged to employer.—In a prosecution under the Oregon statute providing for the punishment of an agent of any corporation who "shall embezzle or fraudulently convert to his own use * * * any money * * * of another * * * which shall come into his possession * * * by virtue of his employment," an indictment alleging that defendant, as agent of an insurance company, received for the company money as premiums for insurance, which he failed to pay over or account for, is insufficient for failure to allege that the money received was in fact the money of the company. *State v. Searns*, 28 Or. 262.

Agent—What constitutes.—One who embezzles money which has come into his possession by virtue of his employment is none the less an agent because he and another compose a partnership which was the agent. *Carr v. State*, 104 Ala. 43.

Private banker.—The liability of a private banker, under Code, § 3797, for fraudulently converting a special deposit of money, is none the less that his bank, which used the money, is a partnership, and such case is covered by an allegation of conversion "to his own use." *Id.*

Allegation and proof.—An indictment for converting a special deposit of money or bank notes to the amount of \$1,600.90 is not supported by testimony that the depositor gave defendant an eastern check of \$5,000 for collection; that he sent it to New York; that the bank there collected the check, and credited defendant's bank generally; and that said bank checked out the proceeds in the usual course of business. *Id.*

Words "special deposit" may be explained.—Though a banker marks a credit in a customer's pass-book "Special Deposit," and gives her a form of check so marked by him, it may be shown that the deposit is a general one. *Id.*

Check not equivalent to money.—In an indictment, an allegation of conversion of money does not cover conversion of a check. *Id.*

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REGINA V. HENDERSHOTT AND WELTER.

(26 Ontario R. 678.)

EVIDENCE: *Coroner's inquest—Subsequent charge of murder—Canada Evidence Act, 1893—Motive—Prior attempt to insure.*

1. A coroner's court is a criminal court, and the depositions of a witness before such court, who is subsequently charged with murder, can not, since the Canada Evidence Act, 1893, be received in evidence against him at the trial, notwithstanding privilege was not claimed by him at the inquest.
2. On a trial for murder, the alleged motive being the obtaining of insurance moneys on policies effected by the prisoner on the life of the deceased, evidence of a previous attempt by the prisoner to insure another person for his own benefit can not be given in evidence against him.

In the High Court of Justice.

In the Court of Oyer and Terminer in and for the County of Elgin.

Osler, Q. C., D. J. O'Donahue, and Kenneth Cameron, appeared for the Crown.

John A. Robinson, for the prisoner Hendershott.

Norman Macdonald, for the prisoner Welter.

The prisoners, John A. Hendershott and William D. Welter, were indicted for the murder of one William Hendershott, a nephew of the prisoner Hendershott, the alleged motive being to obtain the amounts of two insurance policies, for \$6,000 and \$5,000 respectively, which had been effected upon the life of the deceased by John A. Hendershott, and made payable to himself.

The trial took place at St. Thomas, on March 13, 14, 15, 16, 18, 19, 20, 21, 22 and 23, 1895, before Meredith, C. J., and a jury.

During the progress of the trial it was proposed by the Crown counsel to put in the evidence given before the coroner by both the prisoners, who appeared at the inquest and were examined as witnesses, and gave their testimony in that capacity previous to their being charged with the crime.

MEREDITH, C. J. I am going now to dispose of the question of the admissibility of the evidence taken before the coroner, which was tendered on Saturday.

The objection taken by the prisoners is that section 5 of the Act 56 Vict., Ch. 31 (D.), prevents these depositions being used as evidence against them. The language of the section is: "No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any other person; provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence."

Had that statute not been passed, I think there is no doubt that the cases referred to by the learned counsel for the Crown are decisive upon the point that it was the duty of the person examined, if he sought to avail himself of his privilege, to have objected to answer, and if he had not done so, that the depositions might be read in evidence against him. The cases fo *Regina v. Coote*, L. R. 4 P. C. 599, and *Regina v. Connolly*, 25 O. R. 151, referred to, seem conclusive upon that point. They proceeded upon the ground that as the law then stood the person who was called as a witness had the right to object to answer any question which might tend to criminate him, and that if he did not object, he waived that privilege. I think the statute has made an entire change in that respect, and that now no privilege at all exists in a matter to which the statute relates, but that when that privilege has been taken away, the law also has provided that the evidence given shall not be received in evidence against the prisoner in any criminal proceeding.

In the case of *The Queen v. Buttle*, reported in L. R. 1, C. C. R. 248, where the prisoner was indicted for perjury committed with respect to an election, the point taken by the learned counsel for the crown would have been open, but it was not taken, and it seems to have been assumed that a similar statute to this was absolute in preventing the evidence being received against the person who had given it in any criminal proceeding, save in excepted cases.

I think the construction which Mr. Osler asked me to put

upon the statute, requires me to read into it words that are not found there; that substantially I must read it to give effect to his contention, as if it had said: "Provided such person claims such privilege." I find no such words in the statute. But, in the Dominion statute, dealing with an analogous subject (the Controverted Elections Act, R. S. C., Ch. 9, Sec. 39), the provision is: "No person shall be excused from answering any question put to him under this act," similar language to that contained in section 5, "touching or concerning any election, or the conduct of any person thereat or in relation thereto, on the ground of any privilege, or that the answer to such question will tend to criminate such person; but no answer given by any person claiming to be excused on the ground of privilege, or that such answer will tend to criminate himself, shall be used in any criminal proceeding against any such person."

It would appear, therefore, that where the legislature intended that the person should claim the privilege, it has said so in express words. There is no such limitation in the section in question. I think, therefore, that if the statute applies to the proceedings before the coroner, it prevents the use of the evidence that was taken there as evidence against the prisoners.

The only remaining question then is, does it apply to the evidence so taken? That depends upon the effect of section 2: "This act shall apply to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf."

The only point which I had any doubt upon was as to whether the proceedings before the coroner, no person having then been charged, was a matter within the jurisdiction of the Parliament of Canada, or whether it might not be a matter within the jurisdiction of the provincial legislature, and, therefore, not affected by the provisions of the statute. But, upon examination, I find that the coroner's court is a court of record, and it is treated as a criminal court.

It is said in Blackstone, 4th volume, at page 274, that the coroner's court is a court of record, and a criminal court of the realm. In *Regina v. Herford*, 3 E. & E. 115, a very strong court expressed the decided opinion that it was a criminal

court, the question there being whether prohibition would lie to the court, it being a criminal court.

It seems to me, therefore, it being a criminal court, and the section requiring the construction which I have put upon it, that it is impossible that these depositions can be read in evidence against the prisoners, and I therefore reject them as evidence.

At another stage of the case, a witness was asked a question which was objected to, when Mr. Osler, for the Crown, stated that he proposed to prove by the witness that at a conversation which took place in June, 1894, between the witness and the prisoners, the latter endeavored to persuade him to allow them to insure his life; that the witness said he had no money; that the prisoner Hendershott then said he would pay it if he would make the policy payable to him, and that as the result of the conversation an application was made for life insurance, in which Hendershott and Welter acted together, Welter taking the witness to a doctor's office; and that the Crown proposed to prove that the result was that the application was refused; that notwithstanding that refusal, the witness was taken to a doctor outside of the city, to a place where he was less known; and that having been prepared for examination, he was again examined and favorably reported upon; but as a result, the insurance was refused. The Crown also proposed to show a promise by Hendershott to give the witness plenty of money for drinking after the insurance was effected, and to show that there was fraud attempted to be perpetrated upon the insurance company in placing such life insurance; and that the man in his application was wilfully misdescribed by the prisoner Hendershott.

OSLER, Q. C., argued that the evidence was admissible on two grounds. First, as showing a criminal intent in the subsequent act of a kindred nature, namely, the effecting insurances on the life of the deceased, especially having regard to the evidence of the witnesses McConnell and French; and second, that it was evidence of concert between the prisoners; citing as authorities *Makin v. The Attorney-General of New South Wales* [1894], A. C. 57; *The Queen v. Geering*, 18 L. J. N. S., M. C. 215; *Regina v. Dossett*, 2 C. & K. 306; *Regina v. Gray*, 4 F. & F. 1102.

ROBINSON (with him NORMAN MACDONALD), *contra*, objected on the ground that the evidence was not relative to the issue, but was collateral matter in no way connected with the case; that the prior attempt to insure showed no attempt to murder but at most to defraud; and that it was never consummated. It was not linked with the present case, and showed no intent in the prisoner's mind; and cited *Regina v. Winslow*, 8 Cox, 397; *Regina v. Oddy*, 2 Den. C. C. 264.

MEREDITH, C. J. I think Mr. Macdonald's objection is well founded. The matter as to which the evidence is proposed to be given is *res inter alios acta* and therefore inadmissible, unless upon the evidence given by the witnesses McConnell and French, it can be said that it is evidence of an attempt to carry out the plan which, according to that evidence, the prisoner Hendershott then said that he entertained; but, as I am by no means satisfied that it is admissible, even upon that ground, I think I am bound to resolve the doubt in favor of the prisoners and to reject the evidence.

NOTE.—*Privileged communications*.—Under Code, § 3643, making communications to an attorney in his professional capacity privileged, the prosecuting attorney can not be required to testify as to communications made to him by the prosecuting witness in a criminal case. *State v. Houseworth et al.*, 91 Ia. 740.

Deposition at preliminary examination.—In a criminal trial a deposition of the defendant, taken on his preliminary examination, is admissible to impeach his testimony as to the same facts, his attention having been first called to it, notwithstanding Penn. Code, § 686, provides that depositions or preliminary examinations can only be read on the trial where the witness is dead, or insane, or absent from the State. *People v. Hawley*, 111 Cal. 78.

Admissible for any purpose.—Evidence admissible against one of two persons under joint indictment is admissible on the trial of both jointly, under proper restrictions as to its effect, though prejudicial to the defendant against whom alone it is not admissible. *State v. Cram*, 87 Vt. 650.

Same.—Under an exception to the admission of evidence against one of two defendants on trial jointly, based on the ground that the evidence was prejudicial to the other defendant, the court can not, on appeal by the latter from the overruling of the exception, consider the admissibility of the evidence as against the former defendant. *Id.*

That defendant was of weak mind.—Evidence that defendant was a man of weak mind is inadmissible, there being no evidence that he did not have mind enough to distinguish right from wrong. *Dean v. State*, 105 Ala. 21.

That defendant was excited.—Where the evidence showed that the defendant was not excited at the time he killed deceased, evidence relative to his excitable nature is inadmissible. *Id.*

STATE v. HALL ET AL.

(115 N. C. 811.)

EXTRADITION: *Authority of State Governor.*

1. One who has not actually been within the territorial limits of a State since the commission of the crime with which he is charged, though it was constructively committed therein, can not "flee from justice and be found in another State," within Const. U. S. Art. 4, § 2, clause 2, providing that a person so doing shall be surrendered on demand of the State from which he fled.
2. In the absence of a statute requiring him to do so, the Governor of one State has no authority to surrender, upon requisition of another State, a person who is charged with crime therein, but who has not fled from justice, within the meaning of Const. U. S. Art. 4, § 2, clause 2.
3. A State may provide by statute for the surrender, upon requisition, of persons indictable for crime in another State, although they are not fugitives from justice.

Petition by William Hall and another, for a writ of *habeas corpus*. From an order refusing to discharge the petitioners from custody, they appeal. Reversed.

This case upon former appeal is reported in 114 N. C. 909.

The petitioners, Hall and Dockery, were incarcerated in the jail of Cherokee County, on a warrant issued by a Justice of the Peace, charging them with being fugitives from justice from Tennessee for killing, in said State, one Andrew Bryson. The judge refused to discharge the prisoners, and recommitted them to jail to await the warrant of extradition, and they appealed. After setting out the affidavit and the warrant of the Justice of the Peace, and their arrest thereunder, they show that at fall term, 1892, they were indicted for the murder of Andrew Bryson; and at spring term, 1893, were tried and convicted; and appealed to the Supreme Court and obtained a new trial (setting out the judgment of the last mentioned court). They further show that at spring term, 1894, the judgment and opinion of the Supreme Court were filed in the said Superior Court, and they, being brought to the bar of the Court, demanded a trial by jury; whereupon the Judge informed the Solicitor that he must either try the prisoners, or they would be entitled to their discharge; and thereupon the Solicitor entered a *nol. pros.*, and the prisoners were discharged.

They further show that immediately thereafter they were arrested and taken in custody by the Sheriff upon the warrant of the Justice of the Peace, and that they are advised and believe that, under the Constitution and laws of the State and United States, they are entitled to a jury trial upon said indictment in the State of North Carolina, and that they still stand charged with the murder of said Bryson in the Courts of this State, and can not, whilst so charged, be committed or extradited to the State of Tennessee for trial for the same offense. The petitioners further show that, at the time of the alleged killing of Bryson, they were not in Tennessee, nor have they been in said State since the alleged killing; and they are not fugitives from justice from Tennessee; and they are, and ever have been, citizens of North Carolina, and at the time of the alleged killing of Bryson were actually in North Carolina, and have not since been in Tennessee. They further show that they are not guilty of the alleged murder, in the State of Tennessee or elsewhere, and pray that the writ of *habeas corpus* may issue, directed to the sheriff and to whomsoever may hold your petitioners in custody, commanding him or them to have your petitioners before your Honor immediately for the purpose of inquiring into the cause of their commitment and detention, and that they may be discharged from custody.

G. S. Ferguson, for petitioners.

The Attorney-General, for the State.

EVERY, J. The defendants were arrested and are now held under the statute (Code, § 1165), which provides that any one of certain judicial officers therein named, "on satisfactory information laid before him, that any fugitive in the State has committed, out of the State and within the United States, any offense which by the law of the State in which the offense was committed, is punishable, either capitally or by imprisonment for one year or upward in any State prison, shall have full power and authority, and is hereby required to issue a warrant for said fugitive and commit him to any jail within the State for the space of six months, unless sooner demanded by the authorities of the State wherein the offense may have been committed, pursuant to the Act of Congress in that case made

and provided," etc. It is manifest that the prisoners can not be lawfully detained, under the unmistakable language of the law, unless it has been made to appear that they are liable to extradition under the Act of Congress, passed in pursuance of article 4, § 2, cl. 2, of the Constitution of the United States, in order to provide for the surrender of persons charged with criminal offenses "who shall flee from justice and be found in another State." The prisoners were tried for murder in Cherokee County, and upon appeal, it was held (114 N. C. 909) that, if the deceased at the time of receiving the fatal injury was in the State of Tennessee, and the prisoners were in the State of North Carolina, the courts of the former commonwealth alone had jurisdiction of the offense. The prisoners, if such were the facts, were deemed by the law to have accompanied the deadly missile sent by them across the border, and to have been constructively present when the fatal wound was actually inflicted. As our statute confers no power to detain in custody or to surrender, at the demand of the Executive of another State, any person who does not fall within the definition of a "fugitive from justice," according to the interpretation given by the Courts of the United States to the clause of the Federal Constitution providing for interstate extradition, and the Act of Congress passed in pursuance of it, the only question before us is whether a person can, in contemplation of law, "flee from justice" in the State of Tennessee when he has never been actually, but only constructively, within its territorial limits. Upon this question there is abundant authority, emanating, not only from the foremost text writers and some of the ablest jurists of the most respectable State courts, but from the Supreme Court of the United States, whose peculiar province it is to declare what interpretation shall be given to the Federal Constitution and the statutes enacted by Congress in pursuance of its provisions, which are declared by that instrument to be the supreme law of the land. If we can surrender, under our statute, only fugitives within the meaning of the Act of Congress, it would seem sufficient to cite *Ex parte Reggel*, 114 U. S. 642 (5 Am. Cr. Pr. 20), where it is held that a person arrested as a fugitive has a right "to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and consequently withdrew from her jurisdiction, so that he could

not be reached by her criminal process." It is admitted that the prisoners have never withdrawn from the jurisdiction of the Courts of Tennessee, and have never been, either at the time when the homicide was committed or since, exposed to arrest under process issuing from them. But in a case involving so important a principle, and calculated to excite general interest on the part, especially, of the legal profession, we feel warranted in not only citing but quoting from other authorities. Where a person is charged with cheating by false pretenses, by means of a misrepresentation in writing sent to another State, whereby he procures something of value in the State to which such writing goes, he is deemed to be constructively present where the false pretense is successfully used, and where the money or property is obtained, and is consequently liable to be indicted and punished there, if he comes within the reach of the process of its courts. *People v. Adams*, 3 Denio, 190. But the Supreme Court of Alabama, in a case exactly in point (*In re Mohr*, 73 Ala. 503), state the principle applicable here with great clearness and force. The defendant was charged with cheating by false pretenses a prosecutor in the State of Pennsylvania, though it was admitted that he had never actually gone within the limits of that State. The court said :

"It is clear to our minds that crimes which are not actually, but are only constructively, committed within the jurisdiction of the demanding State, do not fall within the class of cases intended to be embraced by the Constitution or Act of Congress. Such, at least, is the rule, unless the criminal afterward goes into such State and departs from it, thus subjecting himself to the sovereignty of its jurisdiction. The reason is, not that the jurisdiction to try the crime is lacking, but that no one can in any sense be alleged to have fled from a State, in the domain of whose territorial jurisdiction he has never been corporally present since the commission of the crime." That court cited to sustain this view, among other authorities, Whart. Cr. Pl. (8th Ed.), 231; *Kingsbury's Case*, 106 Mass. 223; *Ex parte Smith*, 3 McLean, 121; and *Wilcox v. Noyle*, 34 Ohio St. 520. Bouvier (Law Dict. 551) defines a "fugitive from justice" as "one who, having committed a crime within one jurisdiction, goes into another in order to evade the law and avoid punishment." The same writer says, also, that the executive

of a State can not be called upon to deliver up a person charged with a criminal offense in another State, unless it appear that such person "is a fugitive from justice." Rapalje (Law Dict. 555) defines a "fugitive from justice" as "one, who having committed a crime in one jurisdiction, flees therefrom into another jurisdiction in order to escape punishment." See, also, 1 Abb. Law Dict. 508, for definition of "fleeing."

To hold that a person who is liable to indictment only by reason of his constructive presence is a fugitive from the justice of a State, within whose limits he has never gone since the commission of the offense, involves as great an error as to maintain that one who has stood still, and never ventured within the reach of another, has fled from him to avoid injury. One who has never fled can not be a fugitive. *Jones v. Leonard*, 50 Iowa, 106; 7 Am. & Eng. Enc. Law, 646, and note 1; Id. 647. Moore, (in his work on Extradition, volume 2, § 581 *et seq.*), after quoting the extract already given from Reggel's case, cites a number of other cases, wherein Governors of States, under well considered opinions of their legal advisers, have recognized and acted upon the principle that a person can not be said to flee from a place where he has never actually been, but to which by a legal fiction he is deemed to have followed an agency or instrumentality, put in motion by him, to accomplish a criminal purpose. Spear (Law Extradition, pp. 396-400) cites and discusses the authorities bearing upon the question whether a person can be a fugitive from a State into which he has never entered, and not only reaches the same conclusion at which we have arrived, but maintains, *arguendo*, that a person who has been extradited as a fugitive can not be sent back from the demanding State, on requisition of the executive who surrendered him, to answer a crime committed while he was a fugitive, because one who is forcibly taken away does not, in contemplation of law or in fact, flee from justice. The author says that, to assume that an abduction by force, though under legal process, is a fleeing, "is a gross absurdity, quite as bad as the theory of fugitives by construction." Had it not been provided by the Constitution of the United States (article 4, § 2, clause 2) that "a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he

has fled be delivered up," etc., the States, as to the right to demand and the power to surrender fugitives from justice, would have sustained relations to each other analogous to those existing between independent nations. *State v. Cutshall*, 110 N. C. 538.

If no stipulation by treaty were now in force requiring the Government of the United States to surrender, on requisition of the authorities of Canada, persons charged with murder in that Dominion, those guilty of such crimes would find this country a safe asylum. In the absence of any provision of law, imposing upon the executive of the State of North Carolina the duty of surrendering, on requisition of the Governors of other States, any person charged with a criminal offense in the demanding States, except such as shall be shown to have fled from justice within the meaning of the Federal Constitution, the governor must search in vain for authority to issue a warrant of extradition, in a case like this before us, as was in effect conceded *In re Sultan* (decided at this term), reported in 115 N. C. 57. While a statute passed now, and making it murder to willfully put in motion within the State of North Carolina any force which should kill a human being in a neighboring State, might not be amenable to such constitutional objection as that discussed in *State v. Knight*, Tayl. Rep. 65 (44), it would, as to this case, be an *ex post facto* law. But in the exercise of its reserved sovereign powers, the State may, as an act of comity to a sister State, provide by statute for the surrender, upon requisition, of persons who, like the prisoners, are indictable for murder in another State, though they have never fled from justice. If it shall be proved that the prisoners were in fact in North Carolina and the deceased in Tennessee when the fatal wound was inflicted, a law may still be enacted giving the governor the authority to issue his warrant and deliver them on requisition. Meantime it may be asked, what can be done to provide for this *casus omissus*? We may answer, in the language of Spear (*supra*, p. 400): "Nothing, by any extradition process, until there is some authority of law for it. * * * State statutes may be enacted to furnish a remedy not now supplied by either Federal or State law." Were the courts, without any semblance of right, to supply the legislative omission, it would be a criminal usurpation of authority, more pernicious to the public interests than the escape of, not

two, but scores of criminals. Appellate Courts can not deliberately legislate for the punishment of crime without incurring a moral accountability as grave as that of the criminal who suffers by the usurpation.

The Attorney-General, with commendable frankness, admitted that he could find no authority to sustain his contention. It is not pretended that a single Appellate Court, Federal or State, or a respectable law writer, has given any other interpretation to the law than that adopted by us. Courts can not amend or override constitutions and statutes, and, upon the higher-law idea, anticipate dilatory legislatures by providing for the safety of the public in the event that anarchists should project deadly missiles across a State border. Mobs can be suppressed, under the common law, wherever they may assemble for an unlawful purpose and attempt to put such purpose into execution. But, if they could not, it would be the duty of the legislature, not of the courts, to provide for their suppression. If there is any foundation for apprehending that the disorderly elements of society are watching for opportunity to take life and destroy property, provided they can see a way of escape through the loopholes of defective laws, the representatives of the people must be trusted to meet, if not anticipate, emergencies as they arise. Neither actual nor possible consequences should deter judges from executing the law as it is plainly written. The *argumentum ab inconvenienti*, when used to bring about a modification of a well established principle of law, should be addressed to the lawmaker, whose province it is to provide a remedy for any evils growing out of its enforcement. Addressed to judges under such circumstances, it is an invitation or a temptation offered to violate their sacred obligations in order to appease the public. In *Spier's Case*, 1 Dev. 491, the Supreme Court declared the prisoner entitled to his discharge upon a writ of *habeas corpus* where the term of the court expired pending his trial for murder, because he could not be again put in jeopardy for that offense. The defect in the law was subsequently remedied by statute, allowing the court to continue into the next week, if a felony were being tried when the week expired. But the court, composed of Taylor, Hall and Henderson, did not hesitate for a moment because a guilty man might escape. On the contrary, Judge Hall said: "The guilt or innocence of the prisoner is as little

the subject of inquiry as the merits of any case can be when it is brought before this court on a collateral question of law." Courts enforce laws, not simply to punish the guilty, but as well to protect the innocent. The law which fails to provide for the extradition of a guilty man must be understood and adhered to, because it may be invoked as a protection to the innocent, who are prosecuted without cause, against the annoyance, expense and invasion of personal liberty involved in being extradited. There was error. The prisoner should have been discharged.

CLARK, J. (dissenting). It is a fact, agreed in this petition, that the defendants, being in this State, slew the deceased, who was over the line in Tennessee. The defendants were indicted in this State for the murder, and convicted. On appeal, the conviction was reversed, this court holding (*State v. Hall*, 114 N. C. 909), that there was a defect of jurisdiction because the offense was committed in Tennessee, and that in legal contemplation the parties committing the crime were in Tennessee. If they were in Tennessee when they committed the crime, they are now in North Carolina, and in legal contemplation are necessarily fugitives from justice. If they were not in Tennessee, but in North Carolina when they committed the crime, then it was error to hold that the defendants could not be convicted in North Carolina. They should be tried in the jurisdiction in which they were when the offense was perpetrated. That has been held to be in Tennessee. If that is sound law, and the defendants were then in law in Tennessee, and now in fact are in North Carolina, they are, in legal contemplation, and within the language and purport of the extradition law, "fugitives from justice." This term is intended to embrace those who, having committed a crime in one State, endeavor to evade justice by being in another State, whither the ordinary process of the State where the crime was committed will not reach them. That is the situation of these defendants. They are sheltering themselves from process by being in another State. They are charged with murder in Tennessee, and are now where the ordinary process of the courts of that State can not reach them. They can only be had for trial in the State of the commission of the crime, by application to the Governor of the State where they are to be

found. They are proper subjects of extradition. If a mob occupying the Jersey side of the Hudson, should shell the city of New York, or from the opposite shore of the Delaware, should cannonade the city of Philadelphia, its members would be liable to no punishment in New Jersey, under the decisions of the courts, because, "in contemplation of law," the mobs are in New York and Pennsylvania. But if it is true, as is contended by the defendants, that the members of the mob can not be extradited because the mob never was in those cities, it would be a singular state of things. This ruling would also place Savannah, Memphis, St. Louis, Cincinnati, Louisville and hundreds of other cities and towns at the mercy of any mob which might assemble, with weapons of long range, across the State line. The preamble to the Constitution of these States recites that it was ordained "to form a more perfect union and insure domestic tranquillity."

Article 4, § 2, cl. 2, provides "that any person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime." It would be a restricted construction, and little calculated to "form a more perfect union and establish domestic tranquillity," to hold that a "fugitive from justice," in the purview of this provision, applies only to persons who, being actually as well as potentially in the State where the crime was committed, afterwards departed the same. A person who places himself outside the limits of the State from thence to commit the crime within said State, and ever afterwards avoids going into said State to avoid arrest, as truly "flees from justice" as he who, having committed a crime, flees from the State subsequently. If an infernal machine sent by mail or express from a distant State explodes and kills the receiver, it is murder committed in the latter State. The sender skulking in another State to avoid arrest is as truly a fugitive from justice as if he had accompanied the machine to its destination and then fled. The constitutional provision for extradition, and the laws passed in pursuance thereof, it should be remembered, are not criminal, but remedial provisions. They should therefore be liberally construed to effect the purpose intended to be served, which is to extend into another State,

through the medium of its Executive, the process of the State whose laws have been violated. This process, having no validity beyond its borders, can only be made available to arrest the person charged with crime by virtue of the Governor of the State, where such person is to be found, acting under the extradition, just as a magistrate of one county may indorse a summons issued by a Justice of the Peace in another county under the Code. Civilized man must recoil from the practical ruling that the territory adjacent to State boundaries is a "no man's land," and that murder is privileged if committed across a State line. It may be safely said that the judge who first laid down a ruling from which such result practically follows did not foresee the purport and effect of his decision. We are called upon to correct, not to perpetuate his errors, though others have since followed him. It is true that this restricted construction has been placed on this clause by several courts and text writers, but their opinions are merely of "persuasive authority," as we have often held, and entitled only to the weight due to the reasons they give. Years ago Chancellor Kent (1 Comm. 477) said that it would not do to "press too strongly the rule of *stare decisis*, when it is recollected that over one thousand cases in the English and American books have been overruled. Even a series of decisions are not always conclusive, and the revision of a decision often resolves itself into a mere question of expediency."

His remark has received added force since by the fact that overruled cases now number several thousand. Especially a constitutional provision can not be nullified or rendered of no effect by the erroneous ruling of a judge. When the choice is presented us, it is his error, and not the constitution, which must be disregarded. This is clearly so if the constitution is superior to the power of a court to amend it by erroneous interpretation. Courts do not yet claim infallibility, and are not above correcting errors, especially in a matter so clearly against the very intent and meaning of the Federal Constitution, as a ruling that, though a murder has been committed in the United States, yet a State may be powerless either to try the murderer when found in its borders or to surrender him to another State where he may be tried. There is no authority or precedent in this State, and, this being with us a case "of novel impression," we are not hampered from giving such

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construction to the clause as is most consonant to our views of its true intent and purport. It is true the several States might pass statutes broader than the clause quoted from the Federal Constitution, but it is also true that some of them might fail to do so. The Federal Constitution does not contemplate leaving the security of so many cities and towns, lying near State boundaries, dependent upon the inadvertence or unwillingness of the legislature of a neighboring State to pass an extradition law more liberal than the Federal Constitution. Besides, our statute (Code, § 1165) is broader, and authorizes the arrest of "any fugitive" who has committed the crimes therein specified "out of the State and within the United States." A fugitive from justice is simply one who, having committed a crime within a State, keeps himself beyond the ordinary process of the courts of such State. The two cases cited from the Supreme Court of the United States (*Ex parte Reggel*, 114 U. S. 642, and *Roberts v. Reilly*, 116 U. S. 80), read according to the spirit instead of the letter, sustain, rather than militate against, this view; in which case he can be demanded of the executive of any State in which he may be found. Even if there had been no constitutional provision and no statute, the comity existing between States in a Federal union would authorize and require the surrender to another State of a person who has committed murder in that State while standing in this State. Should a man on French soil fire and kill a man across the Rhine on German territory, and the French government, while declaring its own courts incompetent to try the slayer, should at the same time refuse, as is here done, to deliver him to Germany to be tried, would not war promptly follow? Yet certainly, the protection to the criminal should be less and the comity greater, between States in the same Union. This comity between States recognizes corporations chartered in other States. (P. 824.) It should certainly recognize that murder is a high offense at common law against a sister State, and we should refuse to shelter the perpetrator when demanded for trial. In refusing to discharge the prisoner I think there was no error.

MACRAE, J. I join in the above dissent.

NOTE.—*Power of State to surrender fugitive.*—The statement in the majority opinion to the effect that there is no case holding that a State can

not surrender to another State a fugitive from justice without a statute on the subject, is not sustained by the facts. In 1840, one Holmes was delivered to the Canadian authorities by the governor of Vermont as an act of comity. He sued out a writ of *habeas corpus* before the Supreme Court of that State, who refused to discharge him. He prosecuted a writ of error to the U. S. Supreme Court, and that court, by a divided court, McKinley, J., not taking part in the decision, refused to reverse the decision of the Supreme Court of Vermont, mainly upon the ground that the court had no jurisdiction to review *habeas corpus* proceedings on writ of error under the law as it then stood; *Homes v. Jennison*, 14 Peters, 540.

Person prosecuted by information instead of indictment not extraditable.—In *Ex parte Hart*, 63 Fed. R. 249, before Goff and Simonton, Circuit Judges, and Hughes, District Judge, which was an appeal from a judgment of the Circuit Court of the United States for the District of Maryland, refusing to discharge petitioner from custody, to which he had been committed awaiting extradition, Goff, Circuit Judge, delivering the opinion of the court, states that on January 8, 1894, Samuel H. Hart filed his petition for a writ of *habeas corpus* in the Circuit Court of the United States for said district, alleging that he was unjustly deprived of his liberty—charged with the crime of embezzlement. The court directed the issuance of the writ, which was done accordingly, and from the return thereto it appeared that petitioner was held in custody under a warrant issued by the governor of the State of Maryland directed to Alexander G. Matthews, agent of the State of Washington, by virtue of a requisition from the governor of the latter named State, demanding the extradition of the petitioner as a fugitive from justice. With the return were filed copies of the requisition papers and of the governor's warrant of removal, copies of which were set forth, but which are here omitted. After citing the same and the acts of Congress on the subject of extradition in the course of the opinion, it is said:

"By virtue of this legislation, it was the duty of the governor of the State of Maryland to cause the arrest of Hart, and his delivery to the agent designated to receive him, provided it appeared by the papers transmitted by the governor of the State of Washington, that the demand made for the surrender of the fugitive was accompanied by a copy of an indictment found, or affidavit made before a magistrate, charging him with having committed treason, felony, or other crime within said State of Washington, the same being certified as authentic, and it also being shown that the party so charged was a fugitive from justice, and within the jurisdiction of the State of Maryland. Were these essential provisions of the law complied with? The removal of a citizen from one State to another as a fugitive from justice is a matter of great importance, and worthy of serious consideration, yet always to be ordered, when a proper case is made. Such action is based upon article 4, section 2, of the Constitution of the United States, and the laws enacted to enable the same to be executed. The provision referred to will be strictly construed, and all the requirements of the statute must be respected. In this case, does it appear that the papers transmitted and certified to by the governor of the State of Washington were of the character required for the purpose of securing a warrant of arrest and extradition? The first requisition, dated December 23, 1893, recites that it appears by a copy of an "information," which is

annexed, and certified to be authentic, that the petitioner stands charged with the crime of larceny by embezzlement. We do not consider this a compliance with the act of Congress, which we think requires the copy of an indictment found by a grand jury, and not the copy of an information filed by the attorney of the State. An information can not be regarded as a substitute for an indictment where the latter is required in the legislation now under consideration. While it is in the power of the States to provide for the prosecution and punishment of all manner of crime by information, and without indictment by a grand jury (as was held by the Supreme Court of the United States in *Hurtado v. California*, 110 U. S. 516 (S. C., 4 Am. Cr. R.), still, if they wish to rely upon the provisions of the Constitution and laws of the United States relating to fugitives from justice, they must strictly observe and respect the conditions of the same. The indictment had in mind by those who framed the Constitution and enacted the statute referred to, was "a written accusation of one or more persons of a crime or misdemeanor preferred to and presented upon oath by a grand jury." 4 Bl. Com. 299-302. The Supreme Court of the United States has recently described an indictment, as that word is used in the Constitution, as "the presentation to the proper court, under oath, by a grand jury, duly impaneled, of a charge describing an offense against the law for which the party charged may be punished." *Ex parte Bain*, 121 U. S. 1. In this first requisition the copy of the information is all that is certified to be authentic. Holding, as we do, that the information can not be considered as the equivalent of an indictment, we will now examine the argument of counsel for the State of Washington that the verification of the information will be regarded as such an affidavit as is required by the law.

The information is verified by the prosecuting attorney, who swears that he believes the contents thereof to be true, not that they are true. This is not such charging of the commission of a crime before a magistrate of the State as is contemplated by the statute. For the purposes of an affidavit to be used for the arrest and removal of a fugitive from justice, this is not sufficient. The affidavit required in such cases should set forth the facts and circumstances relied on to prove the crime, under the oath or affirmation of some person familiar with them, whose knowledge relative thereto justifies the testimony as to their truthfulness, and should not be the mere verification of a court paper by a public official, who makes no claim to personal information as to the subject-matter of the same. *Ex parte Smith*, 3 McLean, 121; *In re Doo Woon*, 18 Fed. Rep. 898; *Ex parte Morgan*, 20 Fed. Rep. 298. By requiring such an affidavit, the liberty of the citizen is, to a great extent, protected, and the executive upon whom the demand is made is thereby enabled to determine if there is cause to believe that a crime has been committed. To authorize a removal of a citizen of Maryland to the State of Washington for trial on a charge of crime, something more than the oath of a party unfamiliar with the facts that he believes the allegations of an information to be true should be required, and is demanded by the law. To hold otherwise would enable irresponsible and designing parties to make false charges with impunity against those who may be the subjects of their enmity, and permit them, after they have caused public officials to believe their representations, to secure the arrest, imprisonment and removal of innocent persons on papers regular in character, but without merit and fraudulent in fact.

It will be observed in this connection that the affidavits of Alexander McNicol, dated December 23, 1893, and of Clem T. Reese, dated December 27, 1893, filed with the governor of the State of Washington, and by him sent to the governor of the State of Maryland, are not considered, because, among other reasons, they are not recited in nor used to obtain the warrants for extradition, and are not certified to be authentic in either of the warrants so issued. They can not, therefore, be regarded as affidavits, under the section authorizing the warrant of removal; and, in the view that we take of this case, it will not be necessary for us to examine the questions whether an offense has in fact been committed, and if the petitioner is a fugitive from justice, on which points it is insisted that said affidavits can be considered.

The governor of the State of Washington evidently reached the conclusion that the requisition made by him on the 23d of December, 1893, was defective, for we find that he caused another to be issued on the 27th day of December, 1893, in which it is recited that "it appears by a copy of indictment, which is herewith annexed, and which I certify to be authentic and duly authenticated in accordance with the laws of this State, that Samuel H. Hart stands charged with the crime of larceny by embezzlement," etc. On examination of the papers annexed, we find that no such copy of indictment is attached, but that the copy of an information filed by the prosecuting attorney on the 27th day of December, 1893, against said Hart, is filed with and made part of the papers with the requisition. The absence of the copy of the indictment is fatal to the validity of the warrant, which does not pretend to be founded on the copy of information nor of affidavit, but of the indictment alone. The copy of the information does not support the requisition, and if it did, for the reasons heretofore given, would not be sufficient.

The claim that the act of the governor of a State in issuing his warrant of removal is conclusive, and that the presumption is he had the necessary papers, duly authenticated, before him, when he acted, can not be assented to. The act of the governor can be reviewed, and, if he has not followed the directions and observed the conditions of the Constitution and laws of the United States, pertinent to such matters, can be set aside as void. The highest as well as the most obscure official must respect the requirements of the Constitution and the laws made thereunder. The acts of the executive are subject to review by the courts by means of the writ of *habeas corpus*. It is not now necessary to cite authorities on this question, nor to recall incidents in English history, showing that this writ will issue, no matter how obscure the prisoner, nor how great the power of the official who detains him. We find that the requisition issued by the governor of Washington did not comply with the law, and that the governor of the State of Maryland was not furnished with a copy of either an indictment or affidavit, made as required by section 5278 of the Revised Statutes of the United States, and consequently we hold that the warrant of removal is void.

The Supreme Court of Wisconsin *In re Hooper*, 58 N. W. R. 741, holds that a copy of an information duly certified, is a compliance with the law. But I am inclined to the opinion that the reasoning of the Circuit Court of the United States, above quoted, is good law.

Requirement of State statutes.—An Iowa statute requires that the

requisition shall be accompanied by sworn evidence that the person charged is a fugitive from justice. And the court in construing it says that the mere statement in the affidavit that the accused is a fugitive from justice is not sufficient, but that the facts must be stated from which the governor can determine whether or not he is a fugitive. *Jones v. Leonard*, 50 Iowa 100; 22 Am. Rep. 116.

Statutes providing for the arrest of one accused of being a fugitive from justice, before the requisition arrives for his rendition may impose any condition which the legislature may think necessary. *State v. Swope*, 72 Mo. 390; *Ex parte Lorraine*, 16 Nev. 63.

The requisition.—Statements of the governor in his requisition can not aid a defective affidavit. *Ex parte Smith*, 3 McLean, 121.

The indictment.—The fact that the indictment fails to mention the full christian names of the person demanded will not justify the governor in refusing to deliver him up. *People v. Byrnes*, 33 Hun, 98.

The absence of the seal of the clerk of court in which the indictment purports to have been found and of a file mark on the indictment is immaterial. *Hibler v. State*, 43 Tex. 197.

Criminal charge.—The papers must make it appear that the person demanded is substantially charged with a crime against the laws of the State, from whose justice he is alleged to have fled, by an indictment or an affidavit certified by the governor as authentic. *Roberts v. Reilly*, 116 U. S. 80; 29 L. Ed. 544.

Right to look behind papers or to make other requirements.—The question of the sufficiency of the indictment and the guilt of the accused must be left to be determined by the courts of the State where the trial is to be had. *Re Roberts*, 24 Fed. Rep. 132.

The surrender can not be refused because the statute creating the offense for which the surrender is demanded, is alleged to be unconstitutional. *Peerce v. Texas*, 155 U. S. 311.

In a State where printed copies in volumes of statutes of another State are required by statute to be admitted as presumptive evidence of such laws if the crime charged is not alleged to be an offense against the laws of the demanding State, such printed volumes of laws may be examined to ascertain whether it is or is not an offense. *Ex parte Sheldon*, 34 Ohio St. 319.

A resident of North Carolina, who, while in Pennsylvania, procures, by false representations, a contract for the shipment of goods from that place to his residence, and then returns there and receives the goods, and is indicted in Pennsylvania for false representations, is a fugitive from justice, and may be extradited. *In re Sultan*, 115 N. C. 57.

Where a warrant of extradition is granted by the governor, the courts will not inquire into the motive and purpose of the extradition proceedings to ascertain whether the object thereof is to punish crime or collect a debt. *Id.*

But, as said by Mr. Justice Brewer, it is the duty of the court to review the proceedings to see that no extradition is consummated upon a mere pretext, or to subserve private malice. *In re Harris*, 33 Fed. Rep. 105.

Where a requisition is made upon the governor of one State by the governor of another State for the return of an alleged fugitive from justice, and the requisition is accompanied by a copy of the complaint filed in the court to which the party whose return is demanded was held to appear by

the examining magistrate, and also a copy of the evidence adduced at the preliminary hearing before the magistrate, and, on being arrested under a warrant issued by the governor in compliance with the request of such requisition, the party sues out a writ of *habeas corpus* in the District Court, or before a judge thereof, and, to reverse the order of the District Court or judge denying the relief prayed for, brings the case to this court by petition in error, the evidence taken at the preliminary hearing will not be examined for the purpose of ascertaining whether it sustains a charge of a crime alleged to be information, nor to determine whether it supports the finding of the examining court that there was probable cause to believe the party had committed the crime with which he was charged. *In re Van Seoven*, 42 Neb. 772.

Where a requisition is accompanied by a copy of an indictment found by a grand jury, the fact that an indictment has been found is at least *prima facie* evidence that the act charged is a crime, and is so regarded in the State where the act was done, and where the policy of prosecution by information has been established by law, and it appears from the record accompanying the requisition that the party whose rendition is asked has been accorded a preliminary examination, as a result of which he was held to appear and answer to the charge in a higher court, and has been duly charged with the crime in the higher court, in an information filed therein, a copy of which is attached to the papers presented with the requisition to the governor, such information is of as high a grade, as a criminal pleading, as an indictment, and entitled to the same weight as evidence, and will be so considered. *Id.*

(Common Pleas Division.)

REGINA V. PATTERSON.

(26 Ontario Rep. 656.)

FALSE PRETENSES: *Variance between indictment and charge—Criminal Code, 1892, Sec. 641.*

On a charge of stealing 2,200 bushels of beans, for which he was committed for trial, the evidence before the magistrate disclosed that the prisoner had obtained certain cheques on the false pretense that "there were 2,680 bushels of beans" in his warehouse. At the assizes he was indicted for obtaining the cheques on the false pretense "that there was then a large quantity of beans, to wit, 2,680 bushels," in his warehouse. During the progress of the trial, the indictment was amended by striking out the words "a large quantity of beans, to wit," and the prisoner was convicted thereon. *Held*, no such variation as prevented the indictment being preferred for a charge, found upon the facts or evidence disclosed, within the meaning of Section 641 of the Criminal Code, 1892. *Held*, also, that the prisoner not having been misled or prejudiced by the amendment, it was properly made.

Statement. Case reserved by Mr. Justice Street, at the Chatham Assizes.

The prisoner was charged before the police magistrate at Chatham, on February 17, 1894, with stealing 2,200 bushels of beans, the property of Nathan H. Stevens, and was committed for trial on that charge.

At the Spring Assizes for the County of Kent, held on April 9, 1895, an indictment was preferred against the prisoner, not for stealing the beans, but for obtaining from the prosecutor by false pretenses two cheques, the false pretenses alleged being "that there was then a large quantity of beans, to wit, 2,680 bushels of beans, the property of the said Nathan H. Stevens, in the warehouse of the said Archibald Patterson, situated on Erie street, in the village of Ridgetown, and that two car loads of beans that had been sold by said Nathan H. Stevens were not the property of the said Nathan H. Stevens." Before the accused was given in charge to the jury he appealed, under Section 641 of the Criminal Code, 1892, to the presiding judge to quash the indictment, upon the ground that he had not been committed for trial on the charge for which it was preferred, and that it was not for any charge founded upon the facts or evidence disclosed, on the depositions taken before the police magistrate, or otherwise authorized in any of the modes by which alone, as the section provides, it might have been permitted to be preferred.

The application to quash was refused, and the trial, therefore, proceeded, and during its progress, against the objection of counsel for the accused, the indictment was amended by striking out the words "a large quantity of beans, to wit," and upon the indictment, as so amended, the accused was convicted.

The evidence taken at the preliminary investigation before the police magistrate formed part of the case, and the questions to be determined were:

1. Were there facts or evidence disclosed on the depositions taken before the police magistrate, upon which the indictment could or ought to have been preferred, under Section 641 of the Criminal Code, and ought the accused to have been put upon his trial upon the said indictment, or ought the same to have been quashed?

2. Ought the indictment to have been amended and the trial proceeded with, after such amendment, under Section 723 of the Criminal Code?

The case was argued before MEREDITH, C. J., and ROSE, J., in the Common Pleas Division, on June 1, 1895.

Clute, Q. C., for the prisoner.

J. R. Cartwright, Q. C., for the crown.

June 20, 1895, MEREDITH, C. J. (after stating the facts as above set out):

A perusal of the depositions taken before the police magistrate makes it abundantly clear that the facts or evidence disclosed on them were sufficient to found a charge of false pretenses against the accused. The evidence of the prosecutor, Stevens, discloses the fact that the cheques which form the subject of the indictment were obtained upon the representation of the accused that he had, at the time the cheques were got by him, 2,680 bushels of beans in the warehouse of the accused, the property of the prosecutor, and that that representation was untrue, and we think, therefore, that there is no doubt that an indictment might have been preferred against the accused for obtaining the cheques by means of that false pretense, but it was argued by counsel on his behalf that the charge as originally laid in the indictment was a different one from that disclosed in the depositions, that a charge of obtaining the cheques by the false pretense that there was in store a large quantity of beans, to wit, 2,860 bushels of beans, "was a substantially different charge from one where the false pretense was alleged to be that there was (*sic*) in store 2,860 bushels of beans."

It is no doubt true, that upon an indictment charging the false pretense in the former of these terms the words following the words "to wit" were not required to be proved, and that the charge in that case was, in substance, that the false pretense was that there was then in store a large quantity of beans.

To give to the enactment in question the meaning contended for would, in my opinion, be to place upon its language altogether too narrow and restricted a construction.

Before the adoption of the Criminal Code, except in cases

to which Section 140 of Criminal Procedure Act applied, there was no such limitation of the right to prefer an indictment as is now contained in Section 641 of the Code, but in accordance with the recommendations of the report of the Royal Commissioners on the English Draft Code, 1878, pp. 32, 33, the Parliament of Canada, in codifying the criminal laws of the Dominion, extended the substance of the provisions of Section 140 to the case of all indictments.

As pointed out by the Royal Commissioners, their recommendation was based upon what they deemed the manifest injustice of permitting an indictment to be preferred to a grand jury, sitting in secret, and without any opportunity to the accused of being heard, and a bill being found and the accused placed upon trial, upon what might turn out to be a wholly unfounded charge, without any preliminary investigation or even notice of the nature of the charge which was intended to be preferred against him.

Section 616 of the Criminal Code provides that no count in an indictment which charges any false pretense shall be deemed insufficient if it does not set out in detail in what the false pretense consisted, and the law had for many years before permitted a charge of false pretenses to be laid in that way.

Having regard to that provision, and the reason which led to the enactment and the evident objects of section 641, I am of opinion that, inasmuch as the evidence before the police magistrate disclosed a case of false pretenses in respect of the 2,680 bushels of beans, the prosecutor was entitled to prefer the indictment which he did prefer, and that the fact that the false pretense was erroneously laid as being that there was in store "a large quantity of beans, to wit, 2,680 bushels of beans," instead of that there were in store "2,680 bushels of beans," did not form a ground for quashing the indictment as having been preferred without lawful authority. The accused had notice of the nature of the complaint which the prosecutor made against him, and that it in law amounted to a charge of false pretenses, and the substance of the charge was that he had obtained the prosecutor's money by falsely representing that he had in store "2,680 bushels of beans." He must be taken, I think, to have known that under the ample powers of amendment which the courts now possess in criminal matters, the charge which was, in fact, made against him would be

investigated, and that any amendment of the record necessary to enable that to be done, could and would be made.

It is clear, it seems to me, that had the indictment charged that the cheques were obtained by false pretenses without alleging in what the false pretense consisted, it would have been fully authorized by section 641. Why, then, should the addition of the words unnecessarily setting out in what the false pretenses consisted render the indictment liable to be quashed, as having been preferred contrary to the provisions of the section? I am of opinion that it did not, and that it is enough that the facts or evidence disclosed on the depositions were sufficient to found a charge of false pretenses in respect of the same subject-matter, which was the foundation of the charge of stealing upon which the accused was committed for trial.

Regina v. Broad, 14 C. P. 168, though the point which arose there was not precisely the same as that with which we have to deal, supports the view which I have endeavoured to express as to the proper construction of such an enactment as that which I am considering. See, also, section 611 of the Criminal Code.

I am of opinion, therefore, that the first question must be answered in the affirmative.

With regard to the second question, it must be taken that the learned judge at the trial was of opinion that the accused was not misled or prejudiced in his defense by the variance between the evidence given and the charge in the indictment, and that question is not now open; that being so, the learned judge was, I think, fully warranted in making the amendment which was allowed, and the trial was properly proceeded with after that amendment. Section 723.

If it were, however, intended that the case should raise the question whether the accused was misled or prejudiced in his defense by the variance, upon the material before us, I am of opinion that he was not, and that he ought to have been prepared to meet the charge of false pretenses which formed the subject of the inquiry before the police magistrate, and which he had, probably, good reason for thinking was intended to be covered by the language used in the indictment, the legal effect of which the framer of the indictment may not have fully apprehended when he drew it.

I would answer the second question also in the affirmative. In the result the conviction is affirmed.

ROSE, J.—If the indictment had been framed without setting out in detail in what the false pretense consisted, the objection here urged could not have been raised. Nor, do I think it would in anywise have been open, had there been served under such a count particulars in the words appearing in the bill found by the grand jury. Then may not the indictment be treated as one charging a false pretense and giving particulars of such pretense? The code provides for amending particulars, and if the court here had not set out in detail the false pretense, but particulars had been served, then such count being sufficient, an amendment of the particulars under section 723 would not have caused any vice to appear in the proceedings. Equally, it seems to me, is the amendment of the particulars in the count permissible and unobjectionable. The count, as amended, was sustained by evidence, both on the preliminary hearing and at the trial, and it would be a misfortune if on an objection, purely technical, it was necessary to interfere.

I agree that the question must be answered for the crown.

NOTE.—*Instructions need not cover whole issue.*—It is only necessary that the instructions should cover the issue actually presented in the case, and, where the defendant in a criminal action testifies in his own behalf, the court may assume that the facts proven by the witnesses for the State and admitted by the defendant are true, and a failure on the part of the court to state the law fully with reference to those matters that are uncontested is not material error. *State v. Davis*, 56 Kan. 54.

Gift enterprises—What constitute.—The statute of Massachusetts, making it a penal offense to sell property on a representation that anything other than what is specifically stated to be the subject of sale is to be delivered, does not prohibit the sale of tobacco under a promise to give a photograph to each purchaser of a package, though a purchaser is allowed to select his photograph from among a number. *Com. v. Emerson*, 156 Mass. 146.

Instructions must be based on evidence.—On the trial of an indictment alleging that the accused forged a certain order, purporting to be signed by A, and addressed to B, with intent to defraud A, and uttered the same with intent to defraud B, it was error to charge the jury that, if they believed from the evidence the accused "did pass this order with intent to defraud" either A or B, it would be their duty to find him guilty. *Phillips v. State*, 96 Ga. 293.

Indictment—Several distinct acts.—Where, under a statute, several distinct acts connected with the same general offense, and subject to the

same penalties, are punishable separately and as distinct crimes when committed by different persons or at different times, they may, when committed by the same person at the same time, be considered as representing steps or stages in the same offense, and may be combined in the same count of an indictment or information, and treated as a single violation of law, *State v. Meade*, 56 Kas. 600.

(Crown Cases Reserved.)

REG. V. SILVERLOCK.

(18 Cox's Criminal Cases, 104.)

INDICTMENT: *False pretenses—Necessary averments—Person to whom pretense made—Particularity—Evidence—Admissibility—Skilled witness—Expert in handwriting—Experience acquired otherwise than in profession or business.*

1. An indictment which alleges that a prisoner by means of an advertisement in a newspaper made a false pretense to all Her Majesty's subjects, by means of which a person named in the indictment was induced to part with money in the belief that the pretense was true, sufficiently alleges that the false pretense was made to the person so named.
2. In order to render the evidence of a witness admissible on the ground that he is skilled in the matter upon which he is called to give evidence, it is not necessary that such person should be skilled in such matter by reason of his profession or trade. It is sufficient if the court is satisfied that he has in some way or other gained such experience in the matter as to entitle his evidence to credit.

Before Lord RUSSELL, C. J., MATHEW, DAY, WILLIAMS and KENNEDY, JJ.

Case stated by the chairman of the Quarter Sessions for the County of Worcester.

The prisoner was tried on the following indictment:

Worcestershire, to wit: The jurors of our Lady the Queen upon their oath present that George Silverlock, on the twenty-fourth day of May, in the year of our Lord, one thousand eight hundred and ninety-four, unlawfully, knowingly, and designedly did falsely pretend to one Rosa Alice Coates that the name of him, the said George Silverlock, was then Charles Brown; that the said Charles Brown then resided and carried on business at No. 75 Fetter-Lane, High Holborn, London;

that the said Charles Brown then had a branch drapery establishment at Oxford, where two other servants were kept, and then required a steady, reliable, and economical housekeeper for the said branch establishment, to look after the comforts, etc., of twelve young ladies and gentlemen there; that the said Charles Brown was then able and willing to engage the said Rosa Alice Coates as such housekeeper as aforesaid, and also to pay to the said Rosa Alice Coates the sum of thirty-five pounds per annum as such housekeeper as aforesaid; that one John Lewis formerly carried on business at No. 61 Chandos-street, Strand, and had then removed to and carried on business at No. 23 Maiden-Lane, Strand, London, and was then the solicitor of the said Charles Brown, and that the said Charles Brown then *bona fide* required the said Rosa Alice Coates to deposit with the said John Lewis, as such solicitor as aforesaid, the sum of five pounds as a security and by way of guarantee for the honesty of the said Rosa Alice Coates as such housekeeper as aforesaid, by means of which said false pretenses the said George Silverlock did then unlawfully obtain from the said Rosa Alice Coates a certain valuable security, to wit, an order for the payment of money, commonly called a banker's cheque, and of the value of five pounds, with intent to defraud, whereas, in truth and in fact, the name of him, the said George Silverlock, was not then Charles Brown; and, whereas, in truth and in fact, the said Charles Brown did not then reside and carry on business at No. 75 Fetter-Lane, aforesaid, and had not then a branch drapery establishment at Oxford where two other servants were kept, and did not then require a good, steady, reliable, and economical housekeeper for the said branch establishment to look after the comforts, etc., of twelve young ladies and gentlemen there.

And whereas, in truth and in fact, the said Charles Brown was not then able and willing to engage the said Rosa Alice Coates as such housekeeper as aforesaid, or to pay the said Rosa Alice Coates the sum of thirty-five pounds per annum wages as such housekeeper as aforesaid; and whereas, in truth and in fact, the said John Lewis did not formerly carry on business at No. 61 Chandos-street, Strand, aforesaid, and had not then removed to and did not then carry on business at No. 23 Maiden-Lane, Strand, aforesaid, and was not then the solicitor of the said Charles Brown; and whereas, in truth and in fact,

the said Charles Brown did not then *bona fide* require the said Rosa Alice Coates to deposit with the said John Lewis, as such solicitor as aforesaid, the sum of five pounds, as security and by way of guarantee for the honesty of the said Rosa Alice Coates, as such housekeeper as aforesaid, as he, the said George Silverlock, well knew at the time when he did so falsely pretend as aforesaid, against the form of the statute in such case made and provided and against the peace of our said Lady the Queen, her crown and dignity.

Second count. And the jurors aforesaid, upon their oath aforesaid, do further present that the said George Silverlock, on the 17th day of May, in the year aforesaid, by inserting and causing to be inserted in a certain newspaper, called The Christian World, a fraudulent advertisement in the words and figures following—that is to say, “Housekeeper wanted, for branch business establishment in Midlands; one from country preferred. Address, ‘S. C.,’ Christian World Office”—did falsely pretend to the subjects of Her Majesty the Queen, that he, the said George Silverlock, then required a housekeeper for a branch business establishment in the Midlands, by means of which said last mentioned false pretense, the said George Silverlock did then unlawfully obtain from the said Rosa Alice Coates a certain valuable security, to wit, an order for the payment of money, commonly called a banker’s cheque, and of the value of five pounds, with intent to defraud, whereas, in truth and in fact, he, the said George Silverlock, did not then require a housekeeper for the branch business establishment in the Midlands, as he, the said George Silverlock, well knew at the time when he did so falsely pretend as last aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Before the prisoner pleaded, his counsel applied to have the second count of the indictment quashed on the ground that it was not stated therein that the false pretense was made to any definite person, but to all the subjects of Her Majesty the Queen, and that, therefore, it was bad in law, on the authority of *Reg. v. Sowerby* (17 Cox C. C. 767; 63 L. J. 136, M. C.; (1894) 2 Q. B. 173). The prosecution contended that in the offense of false pretenses by advertisement no specific person could be named, and they relied on the cases of *Reg. v. Cooper* (13 Cox C. C. 187; 33 L. T. Rep. N. S. 754; 45 L. J. 15, M. C.; 1 Q. B.

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Div. 19), and *Reg. v. Sargent* (39 J. P. 760), and further contended that, even if the second count was bad in law, the first count would still be good in law; but, as the chairman did not consider the point had been taken in *Reg. v. Sowerby*, he overruled the objection subject to the opinion of this court.

In the course of the trial it was proposed to prove a certain draft advertisement of "S. C.," and certain letters from Charles Brown and John Lewis, alleged to be in the prisoner's handwriting, by comparison of the handwriting in such draft advertisement and letters with that of admitted handwriting of the prisoner; and the solicitor for the prosecution was called as an expert for this purpose. Counsel for the prisoner objected that the solicitor was not an expert, and could not give evidence as to his opinion, and cited the case of *Reg. v. Harvey* (11 Cox, 546), and Blackburn, J.'s, *dictum* therein, that a policeman was not an expert. The solicitor himself said that he had, quite apart from his professional work, for some years—that is, since 1884—given considerable attention and study to handwriting, and especially to old parish registers and wills. He said he had on several occasions professionally compared evidence in handwriting, but said that he had never before given evidence as to handwriting. He stated that he had formed an opinion that the prisoner was guilty before he began to compare the handwriting. I overruled the objection and admitted the evidence on the ground that all the objections went to the weight, not to the admissibility, of the evidence, and that there was nothing in the Act 28 and 29 Vict. C. 18, which makes it necessary to have the evidence of handwriting given by a professional expert, and that any one who has studied handwriting is competent to give evidence, the weight to be given to such evidence being a matter for the jury.

The jury convicted the prisoner and I, at the request of the prisoner's counsel, agreed to state this case for the opinion of the High Court on the following questions of law: (1) Whether an indictment for false pretenses by advertisement must allege a specific person to whom the false pretense was made, or will an indictment for false pretenses by advertisement alleging a false pretense to all the Queen's subjects be good in law? (2) Whether it is necessary, in the case of proving handwriting by comparison, for the person who draws

attention to the points of resemblance to be a professional expert or a person whose ordinary business leads him to have special experience in questions of handwriting, or will the evidence of any person who has, or states he has, for some years studied handwriting be admissible for that purpose? If the court should be of opinion that the first part of the first question should be answered in the affirmative and the second in the negative, and the first part of the second question in the negative and the last part in the affirmative, the conviction will stand; if not, the conviction will be quashed. The defendant was sentenced to twelve months imprisonment with hard labor, but the Court directed him to be released on bail in his own recognizance of 40%, and two sureties of 20% each. As he was unable to find bail he is now in prison.

Marchant, on behalf of the prisoner, submitted, first, that the indictment was bad, inasmuch as it omitted to allege with sufficient particularity the person to whom the false pretense was made; and, secondly, that the evidence as to the handwriting was not that of a professional expert, and had therefore been improperly admitted. In support of the first point, he relied upon *Reg. v. Sowerby (ubi sup.)*, as showing that the omission of an allegation of the person to whom the false pretense was made was fatal to the indictment, and that an allegation that the pretense was made to all Her Majesty's liege subjects was practically the same as if no allegation at all had been made, owing to its generality. He referred to the precedent in Archbold's Criminal Pleadings, 10th ed., p. 536, which is, "did falsely pretend to one J. N.," and submitted that the allegation that by means of the false pretense money was obtained from a particular person did not supply the omission to allege that the false pretense was made to that person, it being consistent with the averments in the indictment that the pretense had been made to one person and the money obtained from another. In support of the second point he submitted that the witness who gave evidence as to the handwriting was merely an amateur and not a professional expert; and that it was laid down in the authorities that a person to be a skilled witness must be expert by virtue of his trade, profession and learning. The Statute 28 and 29 Vict., c. 18, s. 8, merely enabled a comparison to be made of handwritings, but did not

alter the mode in which the comparison was to be made. In Taylor on Evidence, 8th ed., s. 1870, p. 1585, it is stated that, under this enactment, the comparison may be made by witnesses acquainted with the handwriting, by witnesses skilled in deciphering handwriting, or without the intervention of witnesses at all, by the jury themselves, or, if there is no jury, by the court; and in *Reg. v. Harvey* (11 Cox C. C. 546), upon the authority of *Reg. v. Wilbain and Ryan* (9 Cox C. C. 448, Irish), a policeman's evidence as to handwriting was rejected. [Lord Russell, P. J.—It is to be observed that in *Reg. v. Harvey* Blackburn, J., merely pointed out that the policeman was engaged in the case.] In *Bristow v. Sequeville* (5 Ex. 275; 19 L. J. 289 Ex.), it was held that a witness whose knowledge of the law of a foreign country was derived solely from study at a university could not give evidence as a skilled witness.

In *Rowley v. London and North Western Railway Company* (L. Rep. 8 Ex. 221; 29 L. T. Rep. 180; 42 L. J. 153, Ex.) Blackburn, J., said: "It was objected that the witness was not an actuary, but only an accountant; but as he gave evidence that he was experienced in the business of life insurance we think his evidence was admissible." He also cited the Sussex Peerage case (11 Cl. & F. 85) as to who could give evidence as an expert as to foreign law; and the Tracy Peerage case (10 Cl. & F. 154) as to the little weight attached even to the evidence of witnesses as to entries in an old prayer-book whose occupations for a long time had made them so conversant with manuscripts of different ages, that they could take upon themselves to name the period in which a manuscript was written. The principle upon which expert evidence is admissible is stated in Best on Evidence, at p. 464.

Vachell, on behalf of the prosecution, was not called upon in answer to the question as to the admissibility of the evidence, and, in support of the indictment, submitted that allegation in the first count set out correctly the facts at the time the false pretense was made, it having been advertised in a paper, and therefore published to every one. The case of *Reg. v. Sowerby* (*ubi sup.*) is merely an authority that there must be an allegation that the pretense was made to some one, otherwise there is no allegation of a false pretense at all, and it is not an authority that the allegation must be that the pre-

tense was made to the person defrauded. He stated, in answer to the court, that the second count was inserted in the indictment because the indictment in *Reg. v. Cooper* (33 L. T. Rep. 754; 1 Q. B. Div. 19; 13 Cox C. C. 123; 45 L. J. 15, M. C.), contained a similar count and no objection was made to it.

LORD RUSSELL, C. J.—This case comes before the Court under these circumstances: The prisoner was, on the 18th day of June, 1894, tried at quarter sessions upon an indictment which contained two counts. The first count stated, and stated in an unobjectionable way, certain false pretenses as having been made to one Rosa Alice Coates, upon the strength of which the prisoner obtained from her a cheque for the sum of 5*l*. The second count, which is the one we are here considering, alleged that the prisoner had inserted an advertisement in a paper called the *Christian World*, which advertisement ran thus: "Housekeeper wanted for branch business establishment in the Midlands. One from country preferred.—Address S. C., *Christian World Office*." The count then proceeds that by means of that advertisement the prisoner did falsely pretend to all the Queen's subjects, that is, to all to whom knowledge of the advertisement came, that he then required a housekeeper for a branch establishment in the Midlands, and thereby obtained from Rosa Alice Coates a cheque for 5*l*. At the trial, objection was taken to the second count of the indictment; but no objection was or could be taken to the first count, and my surprise begins at this point, that the prosecuting counsel, as the facts applied to both the counts did not ask the court to take the verdict of the jury upon each of the counts. This would have been the ordinary course, and if it had been taken this case could not have come before us. That course was not, however, taken, and we have to decide the question whether the second count is a good one. Now, there is no doubt as to what constitutes the essentials of the offense charged.

There must be a false pretense made, it must be made to a definite person, and it must be proved that such person upon the strength of that false pretense, parted with his or her money or goods. Inasmuch, then, as these are the essential ingredients of the offense, they must be stated in the indictment which charges the offense. The question here is, does

this count, or does it not, fulfil those conditions? Upon the whole, I have arrived at the conclusion that it does sufficiently state those essential conditions. In the first place, the advertisement is addressed to all to whom knowledge of it may come; and if a particular person, seeing that advertisement or hearing of it, acts upon it and goes to the person who caused it to be inserted, and on the faith of it parts with his money or goods, it becomes a false pretense addressed to that particular person, who is one of the class of persons it was intended to act upon. Now, does not that sufficiently appear here? I think it does; it begins by stating that the prisoner inserted the advertisement and thereby made a false pretense, and it then proceeds in these words, which are the important words in this averment, "by means of which he obtained from Rosa Alice Coates a cheque for 5*l*." It therefore does satisfy the requirements by stating the necessary essentials to prove an obtaining money by false pretenses, though it does so loosely and anything but clearly. The case of *Reg. v. Sowerby* (*ubi sup.*), to which reference has been made, we should of course regard as a binding authority; but when it comes to be looked at it is really no authority in favor of the contention based upon it, because there were two important essentials which were wanting. First, there was no allegation that the false pretense was made to anyone; and, secondly there was no allegation of the person from whom the money was obtained. It is to be observed, therefore, that the indictment there was wanting in that it did not state to whom the false pretense had been made, whereas here the false pretense is alleged to be made to all the world, and the person to whose knowledge the advertisement came, and who acted upon it, would come within that class of persons.

The indictment in that case was further wanting in that which is alleged in the present indictment, because it omits the material allegation of the person from whom the money was obtained by means of the false pretense. The case of *Reg. v. Sowerby* decides no more than this, that without those two necessary allegations the court could not, after verdict, supply the omissions. I therefore come to the conclusion that the second count in the present indictment is good. As regards the second question, concerning the proof of the handwriting, it is quite true that this is one of that class of cases

in which, if a person who is called to give evidence professes to be an expert, he must be skilled; but I can not assent that he must have become *peritus* in the way of his business, or in any particular way. The question is, is he *peritus*? If it is attempted to call a witness who is not skilled, the judge would point out that his evidence ought to be disregarded; but I know of no case which requires, as contended, that a man who is skilled in the matter, a man who from past experience is fitted to speak on a question of experience, is to be excluded as a competent witness merely because he has not gained that experience in the way of his business. I say that generally. But in this particular case the witness was *peritus*—in the way of his business. The witness said he had for some years past given considerable attention and study to handwritings, and especially to old parish registers and wills. Once it is determined—and that is the only point we have to determine—that the evidence was admissible, the question of what weight was to be given to it was for the jury, according as they believed him to be *peritus* in the matter with reference to which he was giving evidence. As regards the two cases cited, I do not regard either of them as authorities for the purpose for which they were cited. They amount to no more than this, that in each case the witness was a policeman, and the judge thought that under the circumstances of that case, the evidence was not admissible. Having arrived at the conclusion that the count was good and the evidence admissible, I am of opinion that the conviction must stand.

MATHEW, J. I am of the same opinion. The first question, as to the form of the count, is the only one which appears to me to raise any difficulty; and that difficulty could have been avoided if the ordinary course had been followed of taking the verdict of the jury upon each count. It is very important that that circumstance should be borne in mind; because, here we are obliged to go back and apply the old law as it was in the time of Meeson and Welsbey. It is not necessary to go through the elements essential to constitute the offense of false pretenses; they are familiar to every lawyer. A very excellent description of what is necessary in an indictment for obtaining money by false pretenses will be found in the judgment of the present Master of the Rolls in *Reg. v. Aspinall*

(2 Q. B. Div. 48), where he says that, "To support a charge of obtaining money by false pretenses, it is necessary to show, and therefore to allege, that a prisoner with a wicked and criminal mind, stated something which, if true, would be an existing fact; that he did so with intent to procure the possession of money, etc.; that he knew his statement was—that is to say, that so far as his mind was concerned, he intended that his statement should be—false; that by the statement he did so act on the mind of the prosecutor as that he did thereby obtain money; or, that the statement was in fact untrue, in the sense of being incorrect." Now, if we take this count, it is clear that it offends against the old rules applicable to such matters. But those rules are subject to an extremely important qualification, namely, that after verdict, though you may not supply an absent averment, you may treat another averment which is there as supplying the omission, and we are therefore entitled to point to the fact that the jury had all the facts on the first count brought to their minds. The rule is discussed in *Reg. v. Aspinall* (*ubi sup.*), for the same learned judge says:

"There is another rule with regard to pleading which must be enunciated, the rule with regard to the effect to be given to pleadings after verdict. It is thus stated in *Heyman v. The Queen* (L. Rep. 8, 2 Q. B. 102): 'Where an averment, which is necessary for the support of the pleading, is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the court after verdict that the verdict could not have been found on this issue without proof of this averment, then, after verdict, the defective averment, which might have been bad on demurrer, is cured by the verdict.' Upon this it should be observed that the averment spoken of is 'an averment imperfectly stated,' *i. e.*, an averment which is stated, but which is imperfectly stated. The rule is not applicable to the case of the total omission of an essential averment." That appears to be distinctly applicable to this, and that and *Hamilton v. The Queen* (9 Q. B. 271), dispose of this case. The distinction between this case and *Reg. v. Sowerby* is, that in that case there were absent necessary averments which could not be supplied under the rules to which I have referred. What weighed upon some members of the court was that, if a person had been acquitted on that count,

and had been subsequently indicted for the same offense, he would have had a difficulty in setting up his acquittal. With regard to the point as to the proof of the defendant's handwriting, I am clearly of opinion that the evidence was admissible.

DAY, J. I concur with my Lord.

WILLIAMS, J. I am of the same opinion, and I do not think it was necessary to refer to the rules to which my learned brother Mathew has referred, and which enable the court to supply an imperfect averment. Because here, although the count is inartistically drawn, I concur it was sufficient.

KENNEDY, J. I concur in the judgment of my Lord.
Conviction affirmed.

J. Whitmore, solicitor for the prosecution.
Garratt, Dudley, Worcestershire, solicitor for the prisoner.

NOTE.—*Did kill and murder*—Not sufficient description.—An indictment charging that defendant, "on the 9th day of March, 1894, in the county aforesaid, then and there, feloniously, willfully, and with malice aforethought, kill and murder one J. B.," etc., is fatally defective in substance, and the omission of some word or words before "kill and murder," without which no offense is charged, is not a mere "formal defect," within Code 1892, § 1354, providing that formal defects may be supplied by amendment. *Cook v. State*, 72 Miss. 517.

Duplicity.—An indictment under statute punishing whoever, "with intent to commit larceny, * * * confines, maims, injures, * * * or puts in fear any person, for the purpose of stealing from a building," is not bad for duplicity, because the allegations as to the acts done contain all the elements of an assault and battery. *Com. v. Holmes*, 165 Mass. 457.

Misdemeanor and felony.—An indictment charging a misdemeanor in one count and a felony in another is bad on motion in arrest of judgment after a general verdict of guilty. *James v. State*, 104 Ala. 20.

Idem sonans.—The names "Crusius," as alleged in an indictment, and "Crushes," as shown by the proof, are *idem sonans*. *People v. James*, 110 Cal. 155.

Accessories must be indicted as principals.—In this State an accessory can only be indicted and punished as a principal. *Fixmer v. The People*, 153 Ill. 123.

Circumstances may be stated as inducement.—A statement of the circumstances of the offense, as, in an indictment of an accessory at common law, will not render an indictment bad, provided it also charges the defendant directly with the crime as principal. *Id.*

Indictment for murder does not include assault and battery.—Statutes of Indiana providing that, upon an indictment for an offense consisting of degrees, the defendant may be found guilty of any degree inferior to the one charged, or of an attempt to commit the offense, and that in other cases the defendant may be found guilty of any offense necessarily included in the one charged, do not authorize a conviction of an assault and battery under a charge of murder in the first degree. *Reed v. State*, 141 Ind. 116.

Forgery of deed.—An indictment charging that defendant did “unlawfully, etc., forge a certain deed,” etc., necessarily imports that it was done without authority. *Bennett v. State*, 36 S. W. (Ala.) 947.

Same.—It is not necessary to set out the particular acts in which the forgery consisted. *Id.*

Same.—An indictment charging the forgery of a deed and acknowledgment thereof charges but one offense. *Id.*

How committed.—Forgery may be committed by making an instrument, purporting to be the warranty deed of a person deceased, conveying the land to one who was on trial for taking wood from the land of another, and made for the purpose of being used on such trial. *Id.*

Idem sonans.—“Watkins” and “Wadkins” are *idem sonans*, so that there was no variance between an indictment for forging a deed to one, and the deed itself, purporting to convey the premises to the other. *Id.*

Variance.—There is a fatal variance between an indictment for forgery of a deed which described the land as “north half,” etc., and in which the word “sum” was crossed out, in the clause reciting the consideration for release of dower, and concluding, “Witness my hands and seals,” and an indictment purporting to set out the deed in *hæc verba*, but which described the land as “the north half,” in which the word “sum” was not crossed, and which concluded with, “Witness my hand and seal,” etc. *Id.*

CARR V. STATE.

(96 Ga. 284.)

INSANITY: Defense of—General issue—Instructions.

1. The defense of insanity at the time of the perpetration of the alleged crime is included in, and made by the plea of the general issue; and while, in the absence of a special plea setting up insanity at the time of the trial, it may not have been necessary for the court to explain to the jury the nature and purpose of such a plea, that this was done is not cause for a new trial.
2. The defense being general insanity, and there being no evidence of special dementia, or that the accused was laboring under any delusion as to the act committed, there was no error in charging: “Insanity is where there is a total or partial impairment of the intellect, and to such an extent that the person who is thus affected does not know the

- difference between right and wrong, as to the act that he is committing."
3. That the court undertook, in a general way, to explain to the jury the different forms and kinds of insanity, was not, of itself, an invasion of their province in passing upon the questions of fact involved in the case.
 4. While it may not have been appropriate for the court to inform the jury, as matter of fact, that insanity, in all its forms, was liable to become worse; that insanity of any kind was progressive in its nature; and that, while there were some exceptions, the general rule was that it progressed till it ended in complete dementia—so doing was neither expressing an opinion as to the facts of the pending case, nor, in view of all the evidence and of the respective contentions of the parties, cause for a new trial.
 5. The legal presumption being that every person is sane, and that every such person remains so until the contrary is shown, it is essential to the establishment of the distinctive defense of insanity, as such, that insanity at the time of the commission of the offense be proved by a preponderance of the evidence; and the burden of so doing rests upon the accused.
 6. The charges complained of, and which are not covered by the rulings announced in the preceding notes, if erroneous at all, contain nothing which would justify the granting of a new trial.

Error from Superior Court, Fulton County; R. H. Clarke, Judge.

Alex. Carr, having been convicted of murder, brings error. Affirmed.

Arnold & Arnold, for plaintiff in error.

C. D. Hill, Solicitor-General, and *J. M. Terrell*, Attorney-General, *contra*.

LUMPKIN, J. It is the right of counsel conducting the defense of one charged with crime to file a special plea alleging that the accused is insane at the time of the trial; and when such a plea is filed it becomes the duty of the court to cause the issue thus made to be first tried by a special jury, and if the plea is found to be true an order should be passed committing the accused to the lunatic asylum. In a trial of this kind the merits of the accusation against the accused are not involved or passed upon. When, however, no such plea is filed, and the accused goes to trial upon the general plea of "not guilty," he may show under that plea that he was insane at the time the alleged crime was committed and therefore legally irresponsible for the same. The rules above stated are

well established in the criminal procedure of this State, and no citation of authority in support of them need be made.

At the trial of the case now under investigation the judge undertook to state these rules to the jury. It was perfectly proper to inform them as to the right of the accused to show he was insane at the time he committed the homicide; but there was, perhaps, no occasion for explaining to them the nature and purpose of a special plea alleging insanity at the time of the trial, as no such plea had been filed. We can not see, however, that so doing affords any reason for granting a new trial.

While it is true that counsel for the accused contended he was insane at the time of the trial, they did not choose to present this special plea, and have it first determined; and although, by reason of the instructions of the court, the jury may have been made aware of his right to present such a special plea, it is not at all probable that this operated injuriously against him, because the court very clearly and distinctly informed the jury that his mental condition since the commission of the homicide, and at the very time of the trial, might be considered by them, as throwing light upon the condition of his mind when the homicide occurred; and the question whether or not the accused was insane at the time of the trial was one with which the jury were concerned only in so far as it might throw light upon his mental condition when he took the life of the deceased.

The court, among other things, gave the charge quoted in the second headnote, which was but stating, in substance, the general rule laid down by this court as far back as the case of *Roberts v. State*, 3 Ga. 310, in the following language: "If a man has reason sufficient to distinguish between right and wrong, in relation to a particular act about to be committed, he is criminally responsible." The same rule was announced in *Choice v. State*, 31 Ga. 424, and has been uniformly recognized by this court, so far as we are informed, up to this date.

In *Roberts' case*, *supra*, it was also stated that an exception to the general rule existed where a man has sufficient reason to distinguish between right and wrong as to a particular act about to be committed, yet, in consequence of some delusion, the will is overmastered, and there is no criminal intent. But the qualification was added that the act itself must be con-

nected with the peculiar delusion under which the person is laboring. Judge Nisbet, in commenting upon this exception, refers to the celebrated case of *King v. Hallfield*, 27 How. St. Tr. 1281, and the great speech of Mr. Erskine, which "shed new light upon the law of insanity."

In *Danforth v. State*, 75 Ga. 614, the present Chief Justice, who was then upon the circuit bench, after stating in his charge the general rule as above mentioned, gave the accused the benefit of an exception to the effect that he was irresponsible if the killing was done under some irresistible impulse, the result of a diseased and disordered mind, which overcame his will and took away his power of self-control, provided the act itself was connected with the peculiar delusion, if any, under which he was laboring at that time. Justice Hall, in delivering the opinion of this court, remarked, in general terms, on page 628, that the charge referred to was full, fair, and impartial, and quite as favorable to the accused as, under the law, could have been asked.

In *Fogarty v. State*, 80 Ga. 450, the trial judge was requested, among other things, to charge the jury as follows: "If the defendant commit an assault, knowing it to be wrong, when driven to it by an uncontrollable and irresistible impulse, arising not from natural passion, but from an unsound condition of mind, he is not criminally responsible."

Other requests to a somewhat similar effect were also presented. This court held that there was no error in refusing to give these requests in charge, and it is stated in the opinion that the court declined to review its previous rulings on the subject presented, seeing no reason to doubt their soundness and wisdom. The facts of the Fogarty case are not set forth, but a general idea of the nature of the case may be derived from the concluding sentence of the opinion, on page 468, 80 Ga., where it is stated that "the defendant was guilty of a most outrageous and unprovoked violation of the penal laws of the State, and, being guilty, he must suffer the consequences of his unbridled passion."

Presumably, therefore, there was nothing in the evidence to show that Fogarty acted under the influence of any delusion or irresistible impulse to commit the homicide for which he was held to be responsible in law.

In the case of *Patterson v. State*, 86 Ga. 70, which was an

indictment against the accused for an assault with intent to murder his wife, an effort was made to set up the defense that he stabbed her while acting under an insane delusion and an irresistible impulse. The trial judge, in excluding certain evidence offered for this purpose, expressed an opinion adverse to a defense of this character; but this court declined to pass upon the correctness of this opinion in the abstract, and upheld the rejection of the evidence for another reason.

Whatever may be deducible from the foregoing cases, there seems to be no real necessity, in the case now under consideration, to discuss to what extent the general rule for testing insanity, above stated, may or may not be varied with reference to delusions or irresistible impulses. The defense, as we understand it, was general insanity, and not that the accused was a monomaniac, or afflicted with any particular type of insanity. There was no evidence of special dementia, nor was it sought to be shown that while the accused may, in a general way, have known the difference between right and wrong, he was, upon any particular subject, of defective mind. Certainly there was no proof authorizing the conclusion that in taking the life of King, the accused was acting under any special delusion in connection with that act, or that in committing it he was actuated by an impulse which, from weakness of will, produced by mental disease, he was utterly incapable of resisting. The evidence does show that on various occasions before the homicide the accused manifested eccentricity of mind, and did things which would hardly be expected from persons of sound common sense and of perfectly well balanced minds. It was also shown that he had certain erratic ideas and notions which would not probably have been entertained by a thoroughly sensible and clear-headed man. But, putting all these things together, they did not amount to more than showing that up to the time of the homicide the accused was more or less eccentric in mind, and had certain marked peculiarities of thought and conduct. They would hardly have justified the conclusion that whatever infirmity he had was insanity of any particular form, though they may have manifested a decided tendency to general dementia; and if, at the time of the trial, he was, as his counsel contended, really insane, it was but the outcome of previous indications, which had not gone to the extent of rendering him mentally irresponsible at the time of the killing.

The trial judge was not requested to charge upon the subject of delusions or irresistible impulses, and would, in our opinion, have been justified in declining so to do, for the want of evidence warranting instructions upon these subjects, even if it would, in a case of a different character, have been proper to qualify the general rule we have already mentioned as being quoted in the second head-note. We therefore simply rule that in this case the instruction given was proper and right, and we do not now undertake to say whether, under different facts, it would or would not be the duty of the court to modify this instruction by stating exceptions relating to special phases of alleged mental irresponsibility.

The court undertook, at some length, to state and explain to the jury the different forms and kinds of insanity. The definitions given may not have been comprehensive enough to include every degree and type of this disease, and it may be that the language employed was not, in all respects, perfectly accurate. We do not, however, feel disposed to enter into a discussion of these questions; nor do we think we are able to give any better presentation of the subject than was done by our experienced and learned brother of the circuit bench. It is, at this time, only necessary to say that in telling the jury what insanity was, and in stating the different forms in which it appeared, he did not invade their province in passing upon questions of fact involved in the case on trial; nor did he, in our opinion, say in this connection anything which could have resulted in any harm to the accused.

The court gave to the jury another instruction, the nature of which is indicated in the fourth head-note. We are strongly inclined to the belief that this instruction expresses nothing but the truth, though it may not have been appropriate for the court to inform the jury that insanity, in all its forms, was liable to become worse, and that it generally ended in complete dementia. Still, it would require somewhat of a strain to hold, as was contended, that so doing was expressing an opinion as to the facts of the pending case.

It was also contended that this instruction was hurtful to the accused for an additional reason. His counsel claimed he was insane while the trial was progressing, which the State, of course, denied. The argument here was that, if the jury were of the opinion that the accused was not insane at the trial, they

would have been led by this instruction to believe he could not have been so at any previous time, because, if he ever had been, he would, according to the charge of the court, have been bound to become worse, and therefore would undoubtedly manifest decided insanity at the trial. This argument, it will be perceived, will fall to the ground, if, in point of fact, the appearance and symptoms of the accused during the trial were such as to manifest a then existing condition of insanity or imbecility; and, besides, as has already been stated, the jury were told that they could consider his then condition as illustrative of the state of his mind at the time of the homicide; and under the charge, as a whole, the jury, who were doubtless sensible men, would never have found the accused guilty, if they had not been satisfied that whatever his condition at the trial may have been, he was legally responsible when he shot King down in the street.

The propositions stated in the fifth head-note are sufficiently supported by the decision of this court in Danforth's case, *supra*, and that of *Carter v. State*, 56 Ga. 463.

It would hardly be profitable to enter upon a full discussion, in detail, of all the grounds of the motion for a new trial made in this case. We have carefully examined the charges complained of, and, if erroneous at all, they contain nothing which would justify this court in granting a new trial. Indeed, the charge, as a whole, was a very excellent one.

Counsel for the accused filed a special plea admitting the homicide with which he was charged, but denying his responsibility under the law, because of his alleged insanity at the time the deed was committed, and thereupon claimed the right to open and conclude the evidence and the argument. The court struck out the plea, and refused to allow this privilege. Both these rulings were correct. See, again, Danforth's case.

There was much evidence bearing upon the alleged insanity of the accused. The newly discovered evidence was merely cumulative upon this question.

It was alleged that certain irregularities and improprieties were committed by the court and by counsel for the State during the progress of the trial. The grounds of the motion for a new trial relating to these matters were not, however, approved.

The grounds alleging misconduct on the part of the jury

in reading newspaper reports of the trial were sufficiently disproved by the affidavits of all the jurors. Additional affidavits made by two of the jurors were apparently in conflict with those to which they originally deposed, but these latter affidavits could not be received nor considered for the purpose of impeaching the verdict. *Hill v. State*, 91 Ga. 153.

We have given the evidence in this case a very thorough examination and consideration. In our opinion it fully warranted the jury in reaching the conclusion that at the time of the homicide the accused was not insane, and we find no reason to disturb the verdict. Upon the assumption that the accused knew what he was doing, a more deliberate, cold blooded, and wicked murder was never, perhaps, committed within the borders of this State. In view of all the evidence, we are unwilling to take upon ourselves the responsibility of saying the verdict does not express the real truth of the case. If the unfortunate man who is doomed to death had originally a somewhat diseased mind, and, because of the advancing tendency of his mental infirmity, is now actually insane, the law, in its humanity, will avert from him the penalty of death, and commit him to the lunatic asylum. If he is not insane, he must resign himself to the fate brought upon him by his own lawless and terrible act. Judgment affirmed.

NOTE.—*Mental condition*.—In *People v. Ward*, 110 Cal. 369, which was a trial for bribery, where the defense of insanity was interposed, it was held that evidence of the condition of defendant's mental condition, at the time of examination, is not admissible to prove his mental condition on the date of the killing.

Where circumstantial evidence is relied upon to establish guilt, it should be sufficient to exclude, not every other hypothesis, but every other rational hypothesis than guilt. *Id.*

An instruction asked, containing the words, "that the evidence against defendant is purely and wholly circumstantial," when in fact it is not, is properly denied. *Id.*

Defendant is presumed to be sane until, by a preponderance of evidence, he establishes affirmatively his insanity. *Id.*

Reasonable doubt.—The doctrine of reasonable doubt has no application to the determination of an issue of the sanity of the accused in criminal cases. *Id.*

In this case Searls, C., says: The contention of appellant is that the doctrine of reasonable doubt applies to the question of insanity, and hence that the instruction was erroneous. We need not stop to discuss the question here, as it has been foreclosed against the contention of appellant by the previous rulings of this court. See *People v. McNulty*, 93 Cal. 427; *People*

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v. Travers, 88 Cal. 233; *People v. Eubanks*, 86 Cal. 295; *People v. Kernaghan*, 73 Cal. 609; *People v. Messersmith*, 61 Cal. 246; *People v. Wilson*, 49 Cal. 13; *People v. McDonell*, 47 Cal. 134; *People v. Coffman*, 24 Cal. 231; *People v. Meyers*, 20 Cal. 518. The doctrine of these cases is that in criminal cases the defendant is presumed to be sane until the contrary is made to appear, and his insanity, if relied upon as a defense, must be established affirmatively, by a preponderance of proof, as in civil cases; and, this being so, the question of reasonable doubt, either in favor of or against the defendant, as to his sanity or insanity, has no application to such issue. The instruction upon the question of reasonable doubt, upon the whole case, was full and complete, and in substantially the language of Shaw, C. J., in *Com. v. Webster*, 5 Cush. 320. The court, in instructing the jury upon the subject of insanity, informed them "that the doctrine, that in some forms of insanity the patient or sufferer knows the nature of his act fully, but at the same time can not prevent it, through paralysis of the will power," and which is known as "uncontrollable impulse," has no legal standing in this State, etc. The instructions on the subject of insanity, taken together, are in consonance with the doctrine enunciated in *People v. Hoin*, 62 Cal. 120, and are not objectionable.

COMMONWEALTH v. WALSH.

(165 Mass. 62.)

INTOXICATING LIQUORS: *Maintenance by wife of liquor nuisance—Liability of husband.*

Where a wife keeps in her husband's house liquors for sale in violation of law, the husband is liable for maintaining a liquor nuisance if he has knowledge of the fact of her intent, unless he uses reasonable means to prevent her from carrying out such intent.

Exceptions from Superior Court, Bristol County; Henry N. Sheldon, Judge.

James Walsh was convicted of keeping and maintaining a tenement used for the illegal sale and unlawful keeping of intoxicating liquors, and excepts. Exceptions overruled.

Andrew J. Jennings, District Attorney, for the Commonwealth.

Charles R. Cummings (*J. T. Cummings* with him), for defendant.

KNOWLTON, J. The only exception argued in this case is to an instruction of the presiding justice to the jury as follows:

If the defendant's wife "kept in the house of her husband, or in the premises which were occupied and controlled by her husband, and if the store was in her husband's house it would still be under his control, intoxicating liquors for sale in violation of law, then he will be liable therefor under this complaint, if he has knowledge of the fact and of her intent, unless he uses reasonable means to prevent her from carrying out such intent; and there is no evidence that this defendant has used or attempted to use such means, nor has he contended that he did so." This instruction was in accordance with the decisions of this court. *Com. v. Barry*, 115 Mass. 146; *Com. v. Wood*, 97 Mass. 225; *Com. v. Kennedy*, 119 Mass. 211; *Com. v. Carroll*, 124 Mass. 30.

Upon the hypothesis stated in the instruction, the defendant unquestionably kept the tenement. The tenement was unquestionably "used for the illegal keeping or sale of intoxicating liquor," and therefore, under Pub. St. c. 101, § 6, was a common nuisance. Even if the defendant was ignorant of the illegal use which was being made of his tenement, he was within the terms of the statute which prescribes punishment for a person who keeps a common nuisance.

There is a moral if not a legal obligation upon one in the occupation of real estate, to see that it is not so kept or used as to be a common nuisance; and, if this statute were construed like other statutes in regard to the unlawful sale of intoxicating liquor, the keeper of a tenement which was in fact, under the law, a common nuisance, would be punished, whether he knew of the use which made it a nuisance or not.

But if we construe this statute more favorably to persons accused, and hold that an intent to violate the law must be proved, and that a keeper of a tenement is not liable criminally if, while he uses due diligence, his house is a common nuisance by reason of its use for the unlawful sale of intoxicating liquors by a boarder or lodger, without his knowledge, it does not relieve the defendant in this case. The question whether a keeper of a tenement is liable criminally for individual acts of unlawful sale of liquors made in his house by his wife, from her own property, is very different from the question whether he is liable for continuing to keep the common nuisance, if he knows of the unlawful use of his property and takes no measures to prevent it. Discussions of the question how far

a husband is liable criminally for unlawful acts done by his wife in his actual or constructive presence have little relevancy to the question last above stated. When the tenement is the sole and separate property of his wife, and she has such legal control of it as its ownership gives her, it is a question of more difficulty whether he or she keeps it, within the meaning of the statute. Even in such a case it has been held that, if the building is their dwelling house, the husband so far participates in keeping it for an illegal purpose as to make him subject to punishment. *Com. v. Wood*, 97 Mass. 225; *Com. v. Carroll*, 124 Mass. 30.

The defendant relies upon *Com. v. Hill*, 145 Mass. 305. The decision in that case is merely that certain evidence was wrongly excluded, and is entirely consistent with the instruction given in the present case. The discussion in the opinion relates to facts very different from those assumed in the instruction before us. The title to the real estate in that case was in the defendant's wife, and the evidence tended to show that the unlawful business was carried on by her on her own account; and the defendant offered evidence that he had "used all reasonable and practicable means in his power to prevent his wife from doing any of the acts charged, and that his wife told him the property was hers, and she should do as she pleased."

So far as the language of the opinion tends to modify anything that has been said in previous decisions, it relates to cases where the punishable act is done by the wife, and the question is whether the husband is liable by reason of coercion or participation, while in the case now before us, the husband and not the wife, was confessedly the keeper of the tenement which was so used as to be a nuisance.

The criminal intent involved in the commission of this crime is the intent to keep the tenement, knowing and suffering it to be a common nuisance. It is immaterial who does the other unlawful acts which make it a common nuisance. The keeper's knowledge that it is a nuisance, unaccompanied by active efforts to prevent its being offensive in the eye of the law, is guilty knowledge, which makes him punishable, under the express terms of the statute, for keeping it. In the opinion of a majority of the court the entry must be: Exceptions overruled.

NOTE.—*Ignorance of intoxicating quality of liquor no defense.*—If knowledge of certain facts is necessary to constitute an offense, the respondent can always show an ignorance of such facts in defense, or, rather, to insure a conviction it is incumbent upon the prosecution to show the respondent's knowledge; *e. g.*, it is an offense to pass counterfeit money, knowing it to be counterfeit. *State v. Tomasi*, 67 Vt. 312. To convict, the prosecution must always show the respondent's knowledge of its baseness. The case cited by the respondent (*Crabtree v. State*, 30 Ohio St. 382) is of this class. The statute prohibited the sale of liquor to a person by one knowing him, the vendee, to be a person in the habit of getting intoxicated. It was held necessary to show knowledge of the respondent of the person's habit. The rule in most instances seems to be this: If, to constitute an offense, knowledge of certain facts is essential, it must invariably be shown that the respondent has such knowledge; but if a statute makes an act penal, without reference to knowledge, it is then unnecessary to show it, and ignorance of the fact is no defense.

The rule may be stated in other words, thus: If a statute commands that an act be done or omitted, which in the absence of the statute would be blameless, ignorance of the fact or state of things contemplated by the statute will not excuse its violation. The charge of the court was in accord with the rule as stated in *State v. Hopkins*, 56 Vt. 250. For the many cases in which the same doctrine is held, see *People v. Roby*, 52 Mich. 577; and *Farrell v. State*, 32 Ohio St. 456. A case much in point may be found in the English Exchequer. *Reg. v. Woodrow*, 15 Mees. & W. 404.

Duplicity.—An information charging a violation of Acts 1887 of Michigan, in retailing liquors as a beverage without payment of the required tax, and without posting the county treasurer's notice and receipt therefor, is not bad for duplicity. *People v. Aldrich*, 104 Mich. 455. The pleadings in a prosecution for illegal sale of liquors need not describe the building in which the liquors were sold.

Druggists—Constitutional law.—In *Commonwealth v. Fowler*, 90 Ky. 166, it is held that an act prohibiting druggists from retailing spirituous liquors in quantities less than a quart, except for medicinal purposes, and on the prescription of a physician, is a police regulation, and not in violation of Const., Art. 181, providing for license fees on trades and occupations. The legislature can not prohibit the sale of intoxicating liquors for medicinal purposes but it may regulate the sale of intoxicating liquors by the imposition of a reasonable license tax, and the establishment of a rigid system of police inspection.

Evidence—Sufficiency of.—In a prosecution for sale of liquors, a witness testified that he sent for whisky by defendant; that he told him to bring him some liquor; that he forgot how much money he gave him, but defendant brought him a quart of whisky; and that he paid him nothing for bringing it. *Held*, that the evidence showed a sale by defendant. *State v. Smith*, 117 N. C. 809. Evidence that within eight weeks of that day intoxicated men were seen going out of defendant's place is admissible to show intent on the day charged. *Com. v. Vincent*, 165 Mass. 18. Evidence that defendant, after unlocking the door, took another person into a room in his store; that said person came out with two bottles of whisky; and that there were rumors that defendant sold liquors there, was

sufficient to sustain a conviction for selling intoxicating liquors without a license. *Smith v. Com.*, 96 Ky. 85. Evidence that defendant paid a license fee to the United States, and kept the stamp exposed to view, was properly admitted. *Brown v. State*, 105 Ala. 117.

PEOPLE v. RAIMS.

(20 Colo. 489.)

INTOXICATING LIQUORS: *Regulation by town—Sale of liquor—Mileage limit—County license no defense—Evidence—Proceedings of town board.*

1. Mills' Ann. St. § 4403, subd. 18, gives to an incorporated town the exclusive right to license or prohibit the sale of liquor within one mile beyond its boundaries. Mills' Ann. St., c. 76, gives a general authority to the boards of county commissioners to grant licenses for the sale of liquor. *Held*, that the fact that a county license was issued to one selling liquor within a mile of an incorporated town did not exempt him from the operation of an ordinance of the town thereafter passed, requiring a license to be paid by those selling liquor within that distance of the town.
2. One who acquired no rights between the time of the making up of the original record of proceedings of the town board and the making up of a supplemental record is not injured by the introduction of the latter in evidence.

Error to County Court, Arapahoe County.

Dominic Raims, convicted in a police court of violation of a city ordinance, appealed to the County Court, and from a judgment therein discharging defendant the State brings error. Reversed.

Charles W. Everett, for the People.

No appearance for defendant in error.

CAMPBELL, J. This is an action against the defendant, Dominic Raims, charging him with the violation of an ordinance of the town of Elyria regulating the sale of liquor. In the police magistrate's court, where this action was originally brought, a fine was assessed against the defendant. From that judgment the defendant appealed to the County Court, where a trial was had by the court without a jury, and the defendant

was discharged. The plaintiff brings the case here upon writ of error.

There being no appearance for the defendant in error, we must look to the record and to the argument of plaintiff in error to ascertain the grounds upon which the court based its judgment of dismissal. There are no disputed questions of fact. The evidence is in the form of an agreed statement of facts, the ordinance book and the record book of the town, the supplemental record of the board of trustees as to certain corrections and amendments of the record of the proceedings of the board when the ordinance was passed, setting forth what took place at that time, and oral testimony by the mayor and clerk of the town as to the manner of the passage of the ordinance.

From this evidence it appears that the place of business of the defendant is within the limits of Arapahoe county, and not within any incorporated city or town. It is within one mile of the outer boundaries of the town of Elyria, and, as to location, sustains the same relation to the town of Argo. Both of these towns are incorporated under the general incorporation laws of the State—Elyria on the 1st day of August, 1890; Argo at an earlier date. The boundaries of these towns are not contiguous, though evidently it was contended in the court below that inasmuch as defendant's place of business was within one mile of the limits of each town, the boundaries of the two towns "adjoined," in the sense of the word as employed in the statute.

Prior to the incorporation of the town of Elyria, the defendant was engaged in selling liquor at his place of business in quantities less than one quart; and on the 4th day of August, 1890, he applied to the board of commissioners of Arapahoe county for a liquor license, paid the fee exacted and thereafter received such license from the county, granting him permission to sell for a period of one year.

On the 17th day of February, 1891, the board of trustees of the town of Elyria passed an ordinance, section two of which prohibited the sale of liquor within the limits of the town, and within one mile beyond the outer boundaries thereof, unless the dealer secured from the town a license therefor. Other sections of this ordinance provide a penalty for the violation of section two, and there are other sections for carrying into

effect the provisions of the ordinance. The defendant never had a license from either Elyria or Argo to sell liquor at his place of business, and he admits that he was selling liquor thereat on the 7th day of May, 1891, as charged in the complaint filed in the office of the police magistrate. The regularity of the proceedings before the police magistrate's court is conceded, but the validity of the ordinance is attacked on the ground that the yeas and nays were not called when the ordinance was on its passage, and that the vote thereon was not recorded as our statute requires. The oral testimony and the supplemental record of July 18, 1891, if they are to be considered at all, show conclusively that strict compliance was had with the statute. The questions involved here are:

First. Has the town of Elyria authority, under the statute enumerating the powers of municipal corporations, to enact an ordinance regulating the sale of liquor beyond the outer boundaries of the town, and within one mile of its limits?

Second. Was the county license issued to the defendant a protection to him against the proceeding instituted against him by the town authorities of Elyria?

Third. Is the record of the proceedings of the board of trustees of the town of Elyria, at the date of the passage of such ordinance, sufficient to establish its validity? If not, is oral evidence permissible to show compliance on the part of the board of trustees with section 4445, Mills' Ann. St. (Gen. St. § 3324), which requires that the yeas and nays shall be called and recorded on the passage or adoption of every ordinance?

The first two questions may be considered together. The statutes under which this ordinance was passed, in so far as the same are pertinent here, are as follows: "The board of trustees of every incorporated town shall have exclusive authority to license saloons, groceries and all places wherein spirituous, vinous, malt or other intoxicating liquors are sold." Section 2333, Mills' Ann. St. (Gen. St. § 2106). Section 4403, Subd. 18, Mills' Ann. St. (Gen. St. § 3312), among other things gives to an incorporated town "the exclusive right to license, regulate or prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor within the limits of the town, or within one mile beyond the outer boundaries thereof, except where the boundaries of two towns adjoin."

No authority need be cited to the effect that the regulation of the liquor traffic is purely a legislative power, and that it is also clearly within the power of the legislature to delegate to the municipal authorities the power to regulate, license or prohibit the sale of liquors within their own limits.

We are aware of no rule that requires the legislature, in its grant to towns of the authority to regulate this traffic, to confine the exercise of such power to the limits of the towns themselves. On the contrary, it is within the power of the legislature, in delegation of such authority, to provide that not only the territory included within the limits of the towns but also territory within certain designated distances beyond the outer boundaries thereof shall come under the operation of such granted power. *Chicago Packing, etc., Co. v. City of Chicago*, 88 Ill. 221.

In chapter 76, Mills' Ann. St., is found the general authority of the board of county commissioners to grant licenses for the sale of liquor. The defendant admits that he was selling liquor at his place of business in May, 1891, but says that his license from the county of Arapahoe, granted in the month of August, 1890, to sell for one year thereafter, is a good defense to this action of the town of Elyria. The argument is that the county of Arapahoe is given the authority by the Statute to regulate the sale of liquor within the county. After Elyria was incorporated as a town, and before it exercised its power to pass an ordinance assuming to regulate the sale of liquor within the disputed territory, the defendant obtained a license from Arapahoe county to sell for the period of one year. During such period this license was all the authority that defendant required for conducting his business, because the statutes of the State having given Arapahoe county control over the liquor traffic within its territory, and like authority to the town of Elyria, the county having first exercised such control, and granted to defendant the right to sell, the authority of the town was suspended during the life of the license.

The reply to this argument is that the very words of the statute give to the town exclusive authority to license all places wherein liquors are sold within this disputed territory. This court has repeatedly held, in effect, that the statute means what it says, and that the jurisdiction of the town is

exclusive of that assumed by the county. *Huffsmith v. People*, 8 Colo. 175; *Rogers v. People*, 9 Colo. 450. But, if this conclusion were wrong, another and satisfactory reply is that, even though the authority of the town is not exclusive, still, as defendant's counsel would concede, the legislature has given both to the county and to the town authority to regulate such traffic at the place in controversy. The license is not a contract. As this court and other courts have often held, "a license confers the right to do that which, without the license, would be unlawful." The legislature, having the right absolutely to prohibit such sales as defendant was making, has also the right to confer, and did confer, upon the county and upon the town, the same power of prohibition. When, however, it provided for a license of this class of traffic, it had the power to require that defendant should procure such license both from the county and from the town. So, whether we hold that the authority of Elyria is exclusive of Arapahoe county, or that they had concurrent jurisdiction, the same conclusion will be reached. If the jurisdiction of the town is exclusive, the defendant's license from the county is no defense to this action. If the jurisdiction of the town and county is concurrent, the defendant must procure a license from both, before he can legally engage in the traffic. *Heinsen v. State*, 14 Colo. 228, and authorities there cited.

Assuming that section 4403, Mills' Ann. St., gives the town exclusive authority, it is said that the location of the defendant's place of business makes Argo and Elyria "adjoining" towns, within the purview of the statute, and so takes this case out of its operation, and revives the jurisdiction of the county of Arapahoe. Without expressing an opinion upon this point, it is sufficient to say that the defendant, having no license from the town of Argo, can not avail himself of this defense, if any it be, and this case should be decided as though the town of Argo were not in existence.

The attack upon the validity of the ordinance is not successful. The record of February 17, 1891, is not a model, but it appears therefrom, with reasonable certainty, that all the members of the town board were present at the meeting, and that the entire six voted for the ordinance, upon its passage, and that it was passed unanimously. The clerk, in writing the record, confuses the dates, by making it appear that the

ordinance was passed August 28, 1890, instead of February 17, 1891, but a fair construction of the entire record leaves no doubt that the statute in question was complied with. Even if the original record showed that the ordinance was invalid for the reasons alleged, the supplemental record shows a literal and exact compliance with the statute. The defendant having acquired no rights between the time when the original record was made up and the time of the supplemental record, the introduction of the latter in evidence was proper. *Brophy v. Hyatt*, 10 Colo. 226; *Horr & B. Mun. Ord.*, §§ 58, 59, and authorities there cited; *City of Solomon v. Hughes*, 24 Kan. 211; *Barr v. Village of Auburn*, 89 Ill. 361; *Dill. Mun. Corp.* (4th Ed.) § 297. For the reasons above stated, the judgment should be reversed.

NOTE.—Indictment—Local option—Mileage limit.—An indictment for violating a local prohibitory act need not refer to the statute. *State v. Snow*, 117 N. C. 778. When a statute provides that in all prosecutions for selling liquors the court shall take judicial notice of whether licenses can be lawfully granted in the county, and of the result of local option elections, it is not necessary for the indictment to allege that a local option election was held, resulting against the sale of liquor, in order to charge a violation of the law. *State v. Bertrand*, 72 Miss. 516.

Election.—Where, for the purpose of proving the charge in an indictment charging the defendant with committing the offense of selling intoxicating liquors contrary to the statute, evidence is introduced tending to prove the commission of two or more separate and distinct offenses, it is the duty of the court, before the defendant is put upon his defense, if requested so to do, to require the prosecution to elect upon which transaction the State will rely for a conviction. *State v. Boughner*, 5 S. Dak. 461.

Venue.—Under a statute providing that an indictment shall not be insufficient for want of proper or perfect venue, an affidavit in a prosecution before a mayor, charging the offense to have been committed in a certain county and district, was not bad for failure to allege that it was committed within the corporate limits, particularly as no objection was made before the jury was impaneled. *Burnett v. State*, 72 Miss. 994.

Sale by orders.—Defendant was a licensed dealer in liquors at Boston, and was proprietor of parcel express wagons. Persons living in a district wherein the sale of liquor was prohibited sent written orders to defendant, through his employees, or by depositing the orders at one of the express offices, instructing him, as their agent, to purchase and accept the delivery of liquors from himself at Boston, and ship them by express. The orders were accompanied by money for the purchase of the liquors, and upon receipt thereof the liquors were set apart and shipped to the respective customers by the express wagons. *Held*, on a prosecution for illegally selling liquors in said district that, notwithstanding the form of the orders, there was evidence from which the jury might infer that the delivery of the

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liquors was made by defendant in the prohibited district. *Com. v. Hugo et al.*, 164 Mass. 152.

Where sale completed.—Where the owner of a grocery store situated within a prohibition district takes an order for a jug of whisky, and has it filled without the prohibition district, but in a liquor store of which he is a joint proprietor, and delivers the jug at his store, within the prohibition district, to the purchaser, who pays for it there, the sale is completed within the prohibition district, though the whisky was charged to the purchaser at the liquor store outside of the district. *Brooks v. State*, 105 Ala. 133.

Same.—The statute of Connecticut of 1898, authorizes any licensed dealer in spirituous liquors to solicit and procure orders for his goods in any licensed town in the State. Act 1890, p. 112, provides that "no person shall act as agent to procure and deliver spirituous and intoxicating liquors to any person or firm not legally authorized to sell the same, without a written order," etc. *Held*, that the latter act refers only to persons acting as the agents of the buyer, and not to one acting as agent of the seller. *State v. Hoja*, 66 Conn. 259.

Validity of local option laws.—The legislature may lawfully prohibit the sale of intoxicating liquors within certain prescribed localities. *State v. Barringer*, 110 N. C. 525; *State v. Snow*, 117 N. C. 774. A law prohibiting the sale of intoxicating liquors within two miles of a particular church is valid, notwithstanding a part of the territory so specified is within the limits of a town whose charter had, prior to such enactment, empowered it to license liquor selling. *Id.*

Conduct of court.—It was not error for the court to say to the jury, when they came back for further instructions, that he hoped they would agree before morning, if they conscientiously could. *Com. v. Kelley*, 165 Mass. 175.

Same.—Where the jury came back for further instructions, and the court gave them and added that he hoped they would agree before morning, but as defendant's counsel was absent, no exception was taken to the remark at the time, it can not be considered on appeal, though the exception was afterward allowed. *Id.*

STATE V. SAWTELLE.

(66 N. H. 488.)

JURORS: Right to be tried by impartial jury—Meaning of the term—Election between counts—Homicide—Evidence—Competency of child as witness—Jurors—Challenge for opinion.

1. One can not complain that telegrams properly admissible against him were obtained by an order of the court, the company having refused to produce them.
2. A finding that a girl was a competent witness, made only on her appearance, and her answers that she was eight years old, had been to school,

- understood that she should be bound to tell the truth, and that if she did not tell the truth, God would punish her, is not reviewable.
3. Admission of testimony that the place where deceased's body was found was a solitary, unfrequented neighborhood, and, that five days after the homicide, witness observed horse and wagon tracks at such place, is not reviewable.
 4. Refusal to compel the State to elect between a count for murder and one charging defendant with being an accessory before the fact is not error.
 5. The provision of Bill of Rights that "it is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit," though applying to jurors, does not require the exclusion of a juror who has formed an opinion as to defendant's guilt.
 6. Independently of, as well as under, act 1754, providing that on motion of either party a juror shall be required to answer whether he has given his opinion, or is sensible of any prejudice in the cause, the fact that a juror has formed an opinion is ground for challenge to the favor only, in determining which the fact that in all the county there are probably not to be found twelve jurors, otherwise competent, who have not formed an opinion, is properly considered; and the question whether the juror stands indifferent is one of fact for the trial court.

Exceptions from Strafford County.

Isaac B. Sawtelle was convicted of the murder of his brother, Hiram F. Sawtelle, committed at Rochester, February 5, 1890, and excepts. Exceptions overruled.

Kimball, a witness called by the State, testified that he was station agent at Rochester, and manager of the Western Union Telegraph Company, and produced a printed copy of the following rule of the company: "Whenever a manager or other employe is subpoenaed on the part of the sender or addressee of a message to produce it before a court, or other legal tribunal, he will comply with the subpoena, and afterward return the message to the files; but whenever a manager or other employe is subpoenaed on the part of any person other than the sender or addressee to produce a message, or testify in relation thereto before a court, or other legal tribunal, he will take the message into court, and then submit to the judge that he ought not to produce it or testify in relation thereto, and that he can not do so unless a rule or order of the court be entered requiring it, for the reason that telegraphic messages are of a confidential nature, and that the communication is claimed to be privileged. If such order be made and entered, it will be obeyed, and the clerk of the court will then be re-

quested to furnish a copy of the order, which, together with the subpoena, will be filed with the message to which it relates." Being requested by the State's counsel to produce a telegram sent by the defendant February 4, 1890, from Rochester to Hiram, at Boston, and another sent by the defendant February 5th, from Rochester to Hiram's wife, Jeannette, at Boston, the witness made the objection prescribed by the above rule. The court made the order mentioned in the rule, and the defendant excepted. The witness produced the following original telegrams called "No. 1" and "No. 3:"

No. 1: "Rochester, 4, '90. To H. F. Sawtelle, 1275 Washington street, Boston, Mass.: Marion very sick abed. Grippe. Feverish and growing worse. Mother says come. Will meet you at depot. Answer. Isaac."

No. 3: "Rochester 5, '90. To Jenet Sawtelle, 1275 Washington street, Boston, Mass.: Somewhat better. Take next train. Will meet you depot, Rochester, N. H. Isaac."

Horne, a messenger in the telegraph office in Rochester, testified that on the 4th of February, 1890, he saw the defendant write telegram No. 1 in the Rochester station and give it to the telegraph operator; and Wilcox, the operator, testified that he sent it the same day. Horne also testified that the next day the defendant wrote No. 3, and Horne gave it to the operator; and the operator testified that he sent it. Subject to the defendant's exception, No. 1 and No. 3 were admitted in evidence.

Jeannette testified that in the evening of February, 1890, "we" (apparently meaning her husband and herself) received No. 1 in Boston. A copy of a message, called "Telegram No. 2," being shown to Wilcox, he testified that it came to him over the wire.

No. 2: "Boston, Mass., 2, 4, '90. Isaac Sawtelle, Rochester, N. H.: What time and place will you meet me? Is she dangerous? Answer. Jeannette Sawtelle."

Jeannette testified that she left No. 2 at the telegraph office in Boston, late in the night of February 4, 1890, to be sent the next morning if she did not then call at the office. The defendant objected to the admission of No. 2, on the ground that there was no evidence that he received it. The court ruled that there was such evidence, and admitted No. 2, and he excepted.

Marion Sawtelle, a girl evidently less than fourteen years of age (daughter of Hiram and Jeanette), being called as a witness by the State, the defendant objected to her being sworn. In answer to questions by the court, she said: "I am eight years old. Have been at school—the Winthrop street school. Went to school last summer. Understand that, as a witness, I should be bound to tell the truth. If I did not tell the truth, God would punish me." No questions were proposed by counsel, and no other evidence than her answers and appearance was offered on the question of capacity and understanding. The court found that she was competent, and allowed her to be sworn and to testify, and the defendant excepted.

February 14, 1890, a headless corpse was found buried in the woods in Lebanon Me., several miles from Rochester. There was evidence tending to show it to be the body of Hiram. Subject to the defendant's exception, E. Pierce testified that in summer not more than a dozen teams a month passed over the road near the grave, and that there was very little—sometimes not any—travel there in winter.

There was evidence tending to show that late in the afternoon of February 5, 1890, the defendant carried Hiram in a buggy from Rochester village, on the road that passes by the Morrill barn, and killed him at or near the barn. Subject to the defendant's exception, W. Dunnell testified that on the 10th day of February, 1890, he saw the tracks of a horse and wagon near the barn; that the tracks went through the bars, slanting, as if coming from the direction of Rochester village, and turned round, near the back side of the barn, toward the bars.

Judgment was rendered on a verdict of guilty, and the defendant filed this bill of exceptions, which is allowed.

On two other grounds the defendant moved to set aside the verdict. There was no probability that twelve jurors, qualified in other respects, could be found in the county who had not formed an opinion that the defendant was guilty of murder in New Hampshire or Maine. If all who had formed such an opinion were rejected, he could not be tried. The common law rule and the meaning of the statute were taken to be that in all cases, civil and criminal, each party is entitled to a fair trial; that a man is not disqualified to be a juror by an opin-

ion formed upon hearsay, oral and printed, if he can and will try the case solely upon the evidence, according to his oath, uninfluenced by that opinion or that hearsay; that the trial is not rendered unfair by the opinion or the hearsay, if they will not affect the verdict.

In challenges for cause the defendant was limited to the right of a fair trial without the latitude generally allowed in civil and criminal cases where there is no difficulty in procuring jurors who have not formed an opinion, and have not heard much concerning the case. All jurors returned were informed at the outset that those who tried the case would be sworn to try it according to law and the evidence. Full explanation was given of the duty of deciding exclusively upon legal evidence given by sworn witnesses on the stand, and discarding all hearsay and previous opinion; and during the impanelment the explanation was several times repeated, with due emphasis, in different forms, and with specific applications. A juror, who had been examined by the court, and had sworn that he would try the case on the evidence alone, unbiased by his previous opinion, being examined by the defendant's counsel, said the opinion he had formed was so strong that it would require evidence to change it. The court understood his meaning to be that in the exercise of the right of free thought, and aside from a juror's obligations, his opinion would not be changed unless it was shown to be wrong or groundless; and, on being again questioned by the court, he said, if he tried the case as a juror he should do his duty according to the explanation that had been given of it. The court found him competent, and he and another, who gave similar answers, were impaneled with others who were not asked whether evidence would be required to change their opinions, but who, undoubtedly, would have made similar answers.

There was a second count, under General Laws, c. 284, § 3, charging the defendant as accessory before the fact, in New Hampshire, to the murder of Hiram, committed in Maine by some person unknown. The court denied the defendant's motion to require the State to elect on which count the defendant should be tried. The verdict was on the first count.

D. Barnard, Attorney-General, and *J. Kivel*, Solicitor, for the State.

J. A. Edgerly, J. H. Worcester and G. F. Haley, for defendant.

CARPENTER, J. Whether the rule of the telegraph company is a reasonable one, and whether the court might properly have compelled the witness to produce the telegrams, without making the order required by the rule, are questions that need not be considered. *Hall v. Young*, 37 N. H. 134, 142. The method of procuring the telegrams did not concern the defendant. It was immaterial to him whether the witness produced them voluntarily, in compliance with a rule of the company, or involuntarily, under an order of court made in defiance of the rule.

The telegrams were properly received in evidence. They were sufficiently identified. They were competent for the jury to consider, in connection with other evidence, as tending to show that Hiram was in Rochester February 5th, and why he went there. The defendant's telegram No. 3 was evidence of his receipt of telegram No. 2.

Whether Marion Sawtelle was a competent witness was a question of fact. The finding of the court was made upon competent and sufficient evidence, and is not revisable. *Carlton v. Carlton*, 40 N. H. 14, 18-20; *Day v. Day*, 56 N. H. 316; *Free v. Buckingham*, 59 N. H. 219, 226.

The testimony of Pierce, that the place where Hiram's body was found was in a solitary, unfrequented neighborhood, and of Dunnell, that five days after the homicide he observed horse and wagon tracks at the place where it was committed, was not incompetent. An objection to evidence on the ground of remoteness raises no question of law, but one of fact, to the determination of which at the trial term no exception lies. *State v. Boston & Maine Railroad Co.*, 58 N. H. 410; *Morrill v. Warner*, 66 N. H., *post*.

No error of law was committed by the denial of the defendant's motion that the State be required to elect on which count the trial should be had. *State v. Marvin*, 35 N. H. 22, 26; *State v. Lincoln*, 49 N. H. 464, 471; *Com. v. Hills*, 10 Cush. 530; *Com. v. Slate*, 11 Gray, 60; *Com. v. Sullivan*, 104 Mass. 552; 1 Chit. Cr. Law, 253.

The defendant took no exception to the impaneling of the jurors whose competency is now questioned, and by not except-

ing, waived all objection to them. *Temple v. Sumner*, Smith (N. H.), 226, 233; *Rollins v. Ames*, 2 N. H. 349, 351; *State v. Hascall*, 6 N. H. 352, 360; *State v. Rand*, 33 N. H. 216; *State v. Flanders*, 38 N. H. 324. But the trial court, of its own motion, and without the suggestion of either party, may, if it think fit, reserve a question of law for consideration at the law term. Gen. Laws, c. 208, §§ 5, 11; *Steele v. Bates*, 2 Aiken, 338.

"It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." Bill of Rights, art. 35. The guaranty applies to jurors as well as judges. *Temple v. Sumner*, Smith (N. H.), 226, 227; *State v. Webster*, 13 N. H. 491, 492. It is an affirmation of the common law. *Sunborn v. Fellows*, 22 N. H. 473, 486; *Moses v. Julian*, 45 N. H. 52, 54, 55; *In re School Law Manual*, 63 N. H. 574, 576; *State v. Wilson*, 38 Conn. 126, 137; *Spies v. Illinois*, 123 U. S. 131, 169, 170; *Cooley, Const. Lim.* (4th Ed.), 395. It presupposes that unqualified disinterestedness may be impossible of attainment. *Com. v. Worcester*, 3 Pick. 462, 471, 472. The framers of the constitution did not intend that private right should be incapable of vindication, or that crime should go unpunished, whenever, under the frame of government by them ordained, an absolutely indifferent tribunal for the enforcement of law could not be obtained. "A minute, theoretic and remote interest, arising from a possible participation in penalties either payable to the town, county or State, does not disqualify one from acting as a judge, when all are so interested who can act, and when the law would remain unexecuted without it." *Com. v. Emery*, 11 Cush. 406, 411. Nor does such an interest in a like case disqualify a juror. *Com. v. Ryan*, 5 Mass. 90, 92; *Moses v. Julian*, 45 N. H. 52, 55. An act providing that "in indictments and penal actions for the recovery of any sum of money, or other thing forfeited, it shall not be a cause of challenge to any juror that he is liable to pay taxes in any county or town which may be benefited by such recovery," is not a violation of the Massachusetts declaration of rights, assuring to every citizen "the right to be tried by judges as free, impartial and independent

as the lot of humanity will admit." *Com. v. Reed*, 1 Gray, 472.

In Vermont a justice of the peace may properly try and convict a defendant, and impose on him a fine payable to the town of which the justice is a rated inhabitant, notwithstanding a provision of the statute that "no justice of the peace shall take cognizance of any cause where he shall be directly or indirectly interested in the cause or matter to be tried." *State v. Batchelder*, 6 Vt. 479. The court say (page 486): "Nothing is more true in theory than that every judge and justice who tries a cause should not have the slightest interest in its determination, and nothing more true in fact and in practice than that, as it respects State cases in general, there is no such judge or justice in Vermont. Still criminal justice must be administered. Every magistrate, like other citizens, is a stockholder, as it respects the funds of the State, and subject to proportional loss or gain by public prosecutions. Yet this trifling State interest, in effect, is just nothing." On the same ground, it is held that a juror is not disqualified by a like interest, though the Constitution secures a trial "by an impartial jury." *Middletown v. Ames*, 7 Vt. 166, 168, 169.

"In actions for the recovery of any penalty before a justice, it shall be no cause of exception that such justice resides or has property within the town in which the offense was committed, nor that the penalty or any part thereof may belong to such town." Gen. Laws, c. 266, § 8. This act has been in force since 1843 (Rev. St., c. 211, § 6), and its validity has never been questioned. Nearly all the fines imposed by police courts are payable to the towns where the courts are held, and in which the justices reside. Gen. Laws, c. 268, § 7. Objection for this cause to the justice's jurisdiction has never been taken.

In *M. J. J. v. J. C. B.*, 47 N. H. 362, 368, it was held that a justice of the peace is not disabled by his interest as a citizen and taxpayer of the county from trying a bastardy case, at the complaint of a county pauper, on the ground that his interest is "too remote and minute to disqualify him," and "to deny his authority to act in such a case might * * * leave the law unexecuted." Whether, in such case, a justice resident in an interested town would be disqualified because "it would be easy to obtain a disinterested magistrate from

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some town in the vicinity" (47 N. H. 369), has not been determined. *Warren v. Glynn*, 37 N. H. 340; *Gilmanton v. Ham*, 38 N. H. 108; *Holt v. Cooper*, 41 N. H. 111, 115.

Although "the smallest pecuniary interest in the result of a cause disqualifies a juror" (*Page v. Railroad Co.*, 21 N. H. 438), jurors constantly sit in the trial of offenders punishable by fine payable to the county. Exception to them on the ground that, as taxpayers resident in the county, they are interested in the result, has, it is believed, never been taken. If the objection were tenable, the administration of the law would, in such cases, be impossible. No offender punishable by fine or even by imprisonment in jail, could be convicted. The State can not have a change of venue, except in the extraordinary case of a general insurrection. Unless the defendant asks for a change of venue (*State v. Albee*, 61 N. H. 423), he can not be tried "in any other county than that in which" the offense was committed. Bill of Rights, Art. 17.

"During the earliest ages of our judicial history, juries were selected for the very reasons which would now argue their unfitness, *videlicet*, their personal acquaintance with the parties and the merits of the cause; and few rules of law were enforced with greater strictness than those which required that the *venue, visne, or vicinetum*—in other words, the neighborhood whence the juries were to be summoned—should be also that in which the cause of action had arisen, in order that the jury, who were to determine it principally from their own private knowledge, and who were liable to be attainted if they delivered a wrong verdict, might be persons likely to be acquainted with the nature of the transaction they were called upon to try. * * * In order to effect this end, the parties litigant were required to state in their pleadings, with the utmost certainty, not merely the county, but the very venue, *i. e.*, the very district, hundred, or vill within that county where the facts that they alleged had taken place, in order that the sheriff might be directed to summon the jury from the proper neighborhood in case issue should be taken on any of such allegations. * * * Anciently, the jury, in order that they might be persons well acquainted with the controversy, were summoned out of the very hundred designated for the venue. Afterward the rule was relaxed, and in the reign of Edward the Third, it was sufficient if the jury contained six

hundredors. Gilb. Com. Pl. c. 8. This number was, in Henry the Sixth's reign, reduced to four. Fort. de Laud., c. 25. It was afterward, by St. 35 Hen. VIII., c. 6, restored to six. St. 27 Eliz., c. 6, reduced it to two; and so the law remained till long after St. 16 and 17 Car. II., c. 8, after which act it was still necessary that two, at least, of the jurors, should be summoned from the hundred laid in the declaration, and if there were not so many it was cause of challenge. But this last remnant of the ancient strictness was abolished by 4 and 5 Anne [A. D. 1706-7], c. 6, except so far as concerned actions founded upon penal statutes, to which the abolition was extended by 24 Geo. II. [A. D. 1751], c. 18. So that now it is, in all cases, sufficient if the jury be summoned *de corpore comitatus, i. e.*, from the body of the county in which the venue is laid by the declaration." 1 Smith, Lead. Cas. 363, 365.

"*Vicinetum*' is derived of this word '*vicinus*,' and signifieth neighbourhood, or a place neere at hand or a neighbour place. And the reason wherefore the jury must be of the neighbourhood is for that *vicinus factu vicini presumitur scire*; all which is implied in this word." Co. Litt. 158b; Bac. Abr. "Juries," E. 4. "By the policy of the ancient law, the jury was to come *de vicineto*, from the neighbourhood of the vill or place where the cause of action was laid in the declaration; and therefore some of the jury were obliged to be returned from the hundred in which such vill lay, and if none were returned the array might be challenged for defect of hundredors. * * * For, living in the neighbourhood, they were properly the very country or *pais* to which both parties had appealed, and were supposed to know beforehand the characters of the parties and witnesses, and therefore they better knew what credit to give to the facts alleged in evidence. But this convenience was overbalanced by another very natural and almost unavoidable inconvenience—that jurors coming out of the immediate neighbourhood would be apt to intermix their prejudices and partialities in the trial of right." 3 Bl. Comm. 359, 360; 1 Starkie, Ev. 22. It was because of this inconvenience, says Blackstone, that the law requiring jurors to come from the particular vicinage, and that some of them should be hundredors, was finally repealed.

Knowledge of the facts upon which the issue is to be tried depended, and the necessarily consequent impression or opinion on the merits, so far from being an objection to a juror were a desirable qualification. Until 1706 a presumed knowledge in at least two of the twelve was essential. The only reason for requiring hundredors to be of the jury was because of their supposed better knowledge of the facts. If, after the juror was summoned, and before he was sworn, he removed from or alienated his lands in the hundred, he was not, for that reason, liable to challenge, because by his removal or by his alienation of his land his "knowledge can not be divested out of his person." 21 Hen. VI., p. 39, pl. 4; 14 Hen. VII., p. 2, pl. 6; Fitzh. Abr. "Challenge," 68; Brooke, Abr. "Challenge," 65, 71; Dyer, 316b. If the issue was parcel or not parcel of a manor, or upon a custom of the manor, the jury should come of the manor, because they best know the extent of the manor and its customs. *Moore v. Goodgame*, Cro. Jac. 327; *Symonds v. Burlew*, Id. 405; Trials per Pais (8th Ed.), 135; 6 Coke, 14b.

In assize the recovery was often had *per visum juratorum*. Co. Litt. 158b; 1 Reeve, Eng. Law, 326, 327. If, in a subsequent real action, a former recovery was pleaded and the plaintiff replied that the land in issue was not the same, or parcel of the same lands, the question was tried by the jurors of the first trial, or by such of them as were living and could be obtained, impaneled with others. Trials per Pais (8th Ed.), 96, 97; 21 Vin. Abr. 71-73; 1 Burrows, 252-258. They who tried the first issue—viewed the land and examined the bounds—were better qualified than strangers could be upon testimony laid before them to determine whether the land sued for in the second action was the same, on a part of the same land, if they had no motive to favor either party. If a juror had such motive, as if he were interested in the result of the second action, he was rejected, and a stranger called in his place. 4 Hen. VI., p. 23, pl. 12. In a writ of right, the four knights summoned to select the jurors were sworn "to choose twelve knights girt with swords of themselves, and others which best know and will declare the truth between the parties." 22 Edw. III., pp. 17, 18; 7 Hen. IV., p. 20, pl. 28; *Tyssen v. Clarke*, 3 Wils. 541, 560. "Less than a hundred years ago, in England, it was usual to try mercantile cases before a special jury,

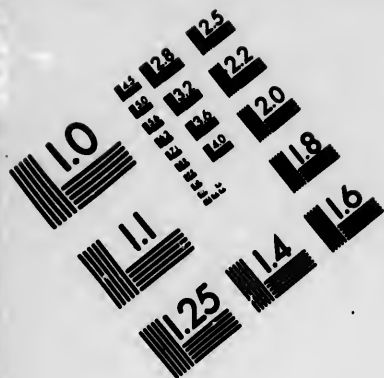
who spoke to the custom of merchants of their own knowledge." 7 Am. Law Rev. 658; *Carvick v. Vickery*, Doug. 653, 654, note.

A jury was summoned for the trial of each cause, and each of several issues in the same cause, if taken upon matters arising in different counties—as if, for example, in a real action by two coparceners the defendant pleads title to one, and to the other a release made in another county, or, in trespass *de bonis*, if the defendant justifies the taking of parcel in one county and parcel in another county. 10 Hen. VI., pp. 9, 10, pl. 35; 33 Hen. VI., p. 55, pl. 47; Fitzh. Abr. "Judgment," 13, 39; Brooke, Abr. "Damages," 135; *Id.* "Costs," 3; 1 Smith Lead. Cas. 364. Although, by the words of the writ of *venire facias*, the sheriff was commanded to return 12 jurors only, "yet by ancient course the sherife must return 24; and this is for expedition of justice; for if 12 should onely be returned, no man should have a full jury appear or be sworn in respect of challenges, without a tales, which should be a great delay of tryals." Co. Litt. 155a. By reason of "the partiality found among them, neighbours having generally a particular attachment to one party more than another" (Bac. Abr. "Juries," E. 4), kinship, personal enmities, and various other disqualifications (Co. Litt. 156a-158b; 3 Bl. Comm. 358-365), this number was often found insufficient, and it became necessary to summon other jurors, called the "tales," to make up the deficiency. *Id.* 365, note 8. This caused delay and expense. As long as so few jurors were summoned, and they were required to come from the immediate neighborhood where the facts occurred upon which issue was taken, and where generally the parties and their witnesses resided, it was essential to the due administration of justice that a juror should not be set aside unless, upon objection taken, he was found to be legally disqualified. Hence it is that nearly all the very numerous decisions on the subject in civil cases were made before the statute of 3 Geo. II. (1730), c. 25. That act required that not less than 48 nor more than 72 jurors should be returned from the body of the county for the trial of all issues at the same assizes, and that from them the jurors for the trial of each cause should be selected by lot. 21 Vin. Abr. 213-216; Bac. Abr. "Juries," B. F. 2, 3, 6; Trials per Pais (8th Ed.), 146-163. It had no application to criminal cases.

As counsel suggest, it is by examination of the ancient rather than the modern books that the common law of disqualification of jurors and of challenge is best determined, and the old cases cited from the Year Books and other reports have therefore been examined.

Challenges *propter affectum*, were of two kinds: (1) For principal cause; and (2) to the favor. A challenge is called principal "because if it be found true, it standeth sufficient of itselfe, without leaving anything to the conscience or discretion of the triors." Co. Litt. 156b. It is "the naming of some exception, which being found true, the law presently allows." Term. de la L. "Challenge;" *Temple v. Sumner*, Smith (N. H.) 226, 228; *State v. Howard*, 17 N. H. 171, 191. It admits of no answer, counterplea, or qualification. If it be for kindred, it is immaterial that the juror is also of kin, though in a nearer degree, to the other party, or that, notwithstanding the kinship, the triors find him to be in fact indifferent. 7 Edw. IV., p. 4, pl. 12; Brooke, Abr. "Challenge," 167; Co. Litt. 157a; *Hunsdon v. Baker*, Cro. Eliz. 663; 21 Vin. Abr. 237, 238. No evidence is heard or considered, except such as tends to show the existence or non-existence of the particular fact alleged as the ground of the challenge. The triors are sworn to well and truly try whether the juror is a cousin, servant or tenant, etc., as the case may be, of the party. *Barrett v. Long*, 3 H. L. Cas. 395, 400; *Rex v. Dolby*, 1 Car. & K. 238. A fact which, if established, was not, in judgment of law, inconsistent with indifference, which admitted of qualification, and might be explained away by other evidence, was never a ground of principal challenge.

Challenge to the favor "is when the party alleges any such exception against one or more of the jurors, which is not forthwith sufficient upon acknowledgment of the truth thereof, but rather arbitrable and considerable by the rest of the jurors; as if the sons of the juror had married the daughter of the adverse party." Term. de la L. "Challenge." It "sheweth causes of favour which must be left to the conscience and discretion of the triors upon hearing their evidence to find him favourable or not favourable." Co. Litt. 157b; *Temple v. Sumner* and *State v. Howard*, *supra*. It raises no question of law, but the question of fact whether the juror stands indifferent between the parties. "The causes of favour are infinite." Co.



1.5 1.8 2.0 2.2 2.5
2.8 3.2 3.6 4.0

1.0 1.1 1.2 1.3 1.4 1.5 1.6 1.8 2.0 2.2 2.5 2.8 3.2 3.6 4.0

Litt. 157b. In this form of challenge, probable circumstances of suspicion, such as great intimacy with one party, or strife and quarrels with the other, any acts or sayings indicating affection for one or malevolence toward the other; in short, anything tending to show a motive on the part of the juror to favor one party or to wrong the other, may be alleged and proved. Evidence in rebuttal of the allegations, or qualifying and explaining them, may be adduced by the opposite party, and, upon the whole evidence, it is to be found whether the juror "stands indifferent as he stands unsworn." The triors are sworn "to well and truly try whether the juror stands indifferent between the parties, and thereof a true verdict give according to the evidence." 26 How. State Tr. 1227; 1 Salk. 152; Joy, Chal. 222.

"When any challenge is made to the polls, two triors shall be appointed by the court, and if they try one indifferent, and he be sworne, then he and the two triors shall try another; and if another be tried indifferent, and he be sworne, then the two triors cease, and the two that be sworne on the jury shall try the rest." Co. Litt. 158a. To triors, if demanded, the parties were legally entitled. *O'Coigly's Case*, 26 How. State Tr. 1218-1226; *Edmonds' Case*, 1 State Tr. (N. S.) 792, note. But the facts alleged as principal cause were often not in dispute. By consent, challenges in both forms were sometimes tried by the court. A neglect to ask for triors was apparently deemed such consent. Objections going to the favor only were not infrequently submitted to, and the juror withdrawn without a trial. 21 Vin. Abr., p. 279, pl. 6; 9 How. State Tr. 8-11; *Id.* 1057-1061; 13 How. State Tr. 1108; 16 How. State Tr. 136-138; 18 How. State Tr. 1233; 22 How. State Tr. 1039; 26 How. State Tr. 1223; 31 How. State Tr. 1172, 1173; 1 State Tr. (N. S.) 1034; Joy, Chal. 191-193; 2 Rolle, Abr. 660.

The common law on this subject, as upon all others, is natural law. It recognizes the weaknesses of all mankind—the effect of blood affection, interest, malice, ill will, or other motive upon their discernment of right and wrong—and eliminates them, so far as "the lot of humanity will admit," from its judgments. It permits no one who, from any cause, has a motive or inducement to favor one party or wrong the other to sit in judgment upon their rights. It "has so watchful an eye to the pure and unbiased administration of justice that it

will never trust the passions of mankind in the decision of any matter of right." *Hesketh v. Braddock*, 3 Burrows, 1847, 1856. "I know this," said Sir John Scott (subsequently Lord Eldon), attorney-general in *O'Coigly's Case*, 26 How. State Tr. 1223, "that we live in a country whose government and Constitution is not worth supporting, if it be possible that any trial of men for their lives can be conducted with the concurrence of those to whom is intrusted the administration of justice under circumstances that shall leave upon the mind of any honest man a doubt whether the prisoners tried for their lives have been justly tried or not."

In ancient times the law esteemed those who, being without motive to favor either party, had immediate and personal knowledge of the facts in dispute to form the best conceivable tribunal for the determination of the issue. It held that twelve perfectly impartial witnesses of a transaction were better qualified and more likely to find the truth than twelve strangers would be, upon information conveyed to them by testimony. Until the introduction (about 1650, *Bright v. Eynon*, 1 Burrows, 390, 393, 394) of the practice of granting new trials where verdicts were returned against the evidence, they not only might, but were required to determine the cause in the absence of other evidence, upon their own personal knowledge. *Bushell's Case*, Vaughan, 148, 149; 3 Bl. Comm. 374. But if they should give their verdict upon their own private knowledge, it could never be known whether the verdict was according to or against the evidence. "And therefore, together with new trials, the practice seems to have been first introduced, which now universally obtains, that if a juror knows anything of the matter in issue he may be sworn as a witness and give his evidence publicly in court." 3 Bl. Comm. 375. To this extent only has the ancient doctrine been modified. 1 Starkie Ev. 405, 449; 1 Phil. Ev. 7; Rosc. Cr. Ev. 129; 192; 1 Archb. Cr. Prac. & Pl. 150; 1 Chit. Cr. Law, 607, 608; 2 Hale P. C. 306; Bac. Abr. "Evidence," A, 2; 7 Mod. 2; 1 Salk. 405; 6 How. State Tr. 1012, note; *Reading's Case*, 7 How. State Tr. 259, 267; *Kirwan's Case*, 31 How. State Tr. 543, 807; *Rea v. Rosser*, 7 Car. & P. 648; *Parks v. Boston*, 15 Pick. 198, 209-211, *Patterson v. Boston*, 20 Pick. 159, 166; *Murdock v. Sumner*, 22 Pick. 156, 157; *Schmidt v. Insurance Co.*, 1 Gray, 529, 535, 536; *McKain v. Love*, 2 Hill (S. C.), 506; *Bell v. State*, 44

Ala. 393. In *Dunbar v. Parks* (1802), 2 Tyler, 217, after the evidence was closed, and before argument, a juror stated to the court that he knew some matters relating to the cause, and inquired whether it would be proper for him to communicate his knowledge to his brethren of the panel after they were charged; and thereupon, by direction of the court, he was sworn, and standing in the jury box testified to a material fact. "It is a common occurrence, both in civil and criminal causes, to see jurors on the panel called as witnesses to prove some material facts in their knowledge relating to the matter in question." *State v. Spencer* (1846), 21 N. J. Law, 196, 198, 199.

On the question of a juror's competency, no sound distinction can be drawn between his knowledge of one fact and his knowledge of all facts material to the issue. It can not be foretold that the one fact which he happens to know, however remote and unimportant it may seem to be, may not be the fact upon the existence or non-existence of which the verdict will turn. *Metcalf v. Gilmore*, 63 N. H. 174, 187, 188. His qualification to act as a juror is not affected by his making oath to the fact in open court.

The common law esteems jurors indifferent who have no motive to find for or against either party. All the valid objections to their competency, *propter affectum*, whether for principal cause or for favor, rest on a motive presumed by law, or proved as a fact, to find for one or the other party. "The law presumeth that one kinsman doth favour another before a stranger." Co. Litt. 157a. It presumes that the servant will be moved to favor his master, under whose command he is (21 Edw. IV., p. 67, pl. 52; Brooke, Abr. "Challenge," 183), and a tenant his landlord, who may distrain upon him. One of the reasons for requiring a juror to have an estate of freehold was the motive—the incentive—it afforded to find the issue truly. If, upon attain, his verdict was found to be false, among other penalties, his lands and tenements might be seized by the king. Trials per Pais (8th Ed.), 270, 271; Co. Litt. 294b. Hence a juror who, after he was summoned and before he was sworn, parted with his freehold, was disqualified, "for his feare to offend and to have lands wasted, etc., which is one of the reasons of law, is taken away." Co. Litt. 157a.

In a suit for conspiracy, the defendants' challenge of the jurors, for that in an indictment for the same conspiracy they had found the defendants guilty, was disallowed, because this "did not show that there was ill will between the jurors and them, for the jurors acted upon their oath." 27 Ass. 13; Fitzh. Abr., "Challenge," 137; Brooke, Abr., "Challenge," 120. In an action against two, it was no ground of principal challenge that the juror, with others, had already found the other defendant guilty, and assessed damages for which the challenger, if found guilty, would be charged. 29 Ass. 3; Fitzh. Abr. "Challenge," 145; Brooke, Abr., "Challenge," 132. So if one of the defendants, A, pleaded soil and freehold, and the other, B, pleaded that the soil and freehold were in A, and justified as his servant, it was not a principal challenge for B that the same jurors at a former term tried the issue between the plaintiff and A, and found against A. 18 Edw. IV. p. 12, pl. 8; Brooke, Abr., "Challenge," 175. An arbitrator who was jointly selected by both parties, and fully heard them upon the matter put in issue by their pleadings, could not be challenged for principal cause by either; but, if chosen by one party to act with one chosen by the other, he was challengeable, because "this election makes him, in a manner, a party and counsel for him on whose part he is chosen." 3 Hen. VI. p. 24, pl. 3; 20 Hen. VI. p. 40, pl. 9; 9 Edw. IV.; p. 46, pl. 34; Fitzh. Abr., "Challenge," 37, 57; Brooke, Abr., "Challenge," 7, 85; Co. Litt. 157b. It was not principal cause that a juror was chosen by the other party commissioner for the examination of witnesses in the same case, for he is made commissioner by the king, under the great seal, and is "presumed in law to be indifferent" (9 Coke, 71a; Co. Litt. 157b); nor that on the preceding day the juror had found for the plaintiff upon another issue in the same cause, "for a man shall not be challenged for that he said the truth" (9 Edw. IV. p. 16, pl. 15; Fitzh. Abr., "Challenge," 55; Brooke, Abr., "Challenge," 83). But it is a principal challenge "if the juror hath given a verdict for the same cause, albeit it be reversed by writ of error, or if, after verdict, judgment were arrested. So if he hath given a former verdict upon the same title or matter, though betwene other persons." Co. Litt. 157b, and authorities cited. This was not because he had formed and expressed an opinion upon the merits. If the second trial of the issue was

upon the same evidence he would have a strong motive to find as he did before. One of two opposite verdicts on the same issue and evidence must be wrong, and it might as well be, and was perhaps as likely to be, the last as the first. For a verdict found false upon attaint he was liable to heavy penalties. Trials per Pais (8th Ed.), 270, 271; 3 Bl. Comm. 402-405. A sufficient and perhaps better reason was, that he had, under the solemn sanction of his oath, officially heard the evidence and determined the issue. The law presumed that he would not by his second verdict confess that in the former he was forsworn, as, in attaint, it was presumed that the son of one of the petit twelve who was dead, would not "say contrary to the oath of his father." 34 Ass. 6; Fitzh. Abr., "Challenge," 127; Brooke, Abr., "Challenge," 140.

At common law, as well as by the statute 25 Edw. III., it was a good challenge that the juror, with others, found an indictment against a party for "treason, felony, misprision, trespass, or the like, in the same cause." Co. Litt. 157b; *Colledge's Case*, 8 How. State Tr. 550, 588; 2 Reeve, Eng. Law, 459, 460. The law presumed that "all who indicted him still bore the same ill will against him." Id. 268; Mirror, Just., Ch. 3, § 34. Actions pending between the party and a juror, of such a nature as to imply malice or ill will, as trespass for assault and battery, were causes of principal challenge. Other actions not implying malice, as debt, went only to the favor (Co. Litt. 157b, and cases cited; 21 Vin. Abr. 269, 270); for, "if a man demands his debt of his debtor, it can not be intended that he has ill will against him." 11 Hen. IV. p. 26, pl. 50; Fitzh. Abr., "Challenge," 87. That a juror was a tenant of a party, and "within his distress" (i. e. liable to be distrained for rent or other dues), was a principal challenge; but if not liable to distraint, as if he held upon a rent-seck, or if the party was within the distress of the juror, the challenge was to the favor. Co. Litt. 157a, and cases cited; 21 Vin. Abr. 257-260; Trials per Pais (8th Ed.), 187.

In *Regicides' Case* (A. D. 1660), 5 How. State Tr. 975, it was resolved by all the judges "that if several persons be indicted together in one indictment for one crime, in case some of them be found guilty by one jury, and afterward some of the same jury be returned for trial of others in the same indictment, it is no challenge for those prisoners to say that those jurors have

already given their verdict, and found others guilty who are indicted in the same indictment for the same offense; for * * * in law it is a several indictment against every one of them, and the crime is several, and one may be guilty and not another; and the jury are to give their verdict upon particular evidence against every several person, and therefore the finding of one guilty is no argument or presumption that those jurors will find another guilty." This doctrine was not new. The resolution was in conformity with established principles of the common law. It went upon the ground that a juror who had no malice or ill will against the prisoner or other motive to find against him was indifferent, and was not the less indifferent by reason of the knowledge of the facts in controversy which he obtained from the evidence produced at the other trial. The doctrine has never been questioned by the English courts. *Plunket's Case* (A. D. 1681), 8 How. State Tr. 447, 450, 451; *Cranburne's Case* (1696), 13 How. State Tr. 235; *Cook's Case*, Id. 311, 313; *Willis' Case* (1710), 15 How. State Tr. 521, 614, 615; *Thistlewood's Case* (1820), 33 How. State Tr. 681, 956; *Brunt's Case*, Id. 1177, 1180; *Com. v. Hill* (1862), 4 Allen, 591. If by reason of the prisoner's waiver of his peremptory challenges, or for other cause there was no difficulty in obtaining a jury, the court often—perhaps generally—directed that the jurors of the previous trial be not called. *Regicides' Case*, 5 How. State Tr. 975, 1058, 1059; *Whitebread's Case*, 7 How. State Tr. 311, 319; *Stapleton's Case*, 8 How. State Tr. 502; *Willis' Case*, 15 How. State Tr. 521, 614, 615; *Turner's Case*, 32 How. State Tr. 957-964. Under like circumstances, in other cases, jurors against whom no lawful objection existed were sometimes set aside at the request of the prisoner. At the trial of Count Vratz, in 1682, as accessory before the fact to the murder of Thomas Thynn, by a jury *de medietate lingue*, the prisoner's interpreter said to the court: "My lord, he desires that there be none of the jury that are anything kindred or relation to Mr. Thomas Thynn, nor any particular friend of his, and he is satisfied. Pemberton, C. J.: No, there shall not. We will take care of that." The defendant requested that he might "have the names of those that are returned of the jury, and a little time to consider of it. Pemberton, C. J.: That we can not do. All we can do for you is, we will take as much care as we can that

you may have indifferent persons and persons of quality.
* * The Interpreter: He says, my lord, he does not know who they are, but they may be persons who are touched, and may have something of evil will or spleen against him. His father served against the king of Denmark, and against the Poles and the Papists, and his father was a Protestant and served the Protestant cause. * * * Pemberton, C. J.: Examine them as they come to the book, if there be any of Roman Catholic religion, and do not let any such be sworn." 9 How. State Tr. 1, 8, 11; *Hampden's Case*, Id. 1053, 1057-1061; *Carlile's Case*, 1 State Tr. (N. S.) 1034.

A juror's expression of opinion, however strong, upon the merits, statements indicating malice or ill will, even his assertion that he would find for one of the parties, were grounds for challenge to the favor only. When shown in evidence they were not conclusive. They were not, in law, necessarily inconsistent with indifference. They were subject to rebuttal, qualification or explanation. In a writ of estrepement, the plaintiff challenged a juror for that "he was favorable to the defendant, and had promised him that he would pass for him," wherefore he was tried by the triors, who found him favorable to the defendant, and he was withdrawn. 3 Hen. VI. (1425), p. 38, pl. 3.

In an action of replevin, a juror was challenged "for that he was favorable." Babington, C. J., submitting the question to the triors, charged them as follows: "Do you know, triors, what is meant by 'favorable?' He is favorable who, whether the matter is true or false, will pass for one or the other. * * * But, if one has said twenty times that he will pass for the one or the other party, you will inquire upon your oath where the cause is for the affection he has for the party, or for the knowledge he has of the matter in issue; and, if it is for the affection he has for the party, then he is favorable, but otherwise he is not. And if he has more affection for one party than for the other, yet if he has full knowledge of the matter in issue, and if he is sworn, will declare the truth notwithstanding the affection he has for the party, he is not favorable." 7 Hen. VI. (1429), p. 25, pl. 8; Fitzh. Abr., "Challenges," 22; Brooke, Abr., "Challenge," 55; 2 Rolle, Abr. 655. Neither Fitzherbert nor Brooke intimates a doubt of the law laid down by Babington, although they freely criticise and

question many of the cases they abridged, as, for example, Fitzh. Abr., "Challenge," 21, 23, 33, 131, and Brooke, Abr., "Challenge," 33, 56, 168, 181. The case is twice cited by Coke as one of the numerous instances of challenge to the favor. Co. Litt. 156a (n), 157b (b). With his eye upon it, he enumerates among the principal causes the giving of a "verdict before the same cause" (157b), but does not mention the expression of an opinion upon the merits, or the declaration of a purpose to find for or against a party. He evidently understood that challenges on the latter ground went only to the favor, and that the doctrine of 7 Hen. VI., p. 25, was one of the rudiments of the law, on which there could be no difference of opinion. When this case had been accepted by English courts for 400 years (*Rex v. Edmonds*, 4 Barn. & Ald. 471, 490-943) as a correct application of a familiar principle, an American court fell into the mistake of supposing it was not cited by Coke; that his omission of it was due to its not being considered authority; that it was irreconcilable with his doctrine; and that in *Rex v. Edmonds*, Abbott, Bayley, Holroyd and Best erred in their understanding of the ancient authorities. *People v. Vermilyea*, 7 Cow. 108, 124, 125, 128.

In trespass *quare clausum* the defendant justified his entry by the command of two who were seized of the land jointly with a juror, who for this cause was challenged by the plaintiff; but because the freehold could not be recovered in trespass and the juror could neither gain nor lose by the verdict, the court held that the objection went to the favor only, and submitted the question to the triors, who found the juror "egal," and not favorable. 7 Hen. VI. p. 44, pl. 23; Fitzh. Abr., "Challenge," 24; Brooke, Abr., "Challenge," 57. In attaint, the defendant challenged the array for that the sheriff and one K. had been arbitrators, chosen on the part of the plaintiff, of the matter, with two others selected by the defendant. The question whether this was a principal challenge to the sheriff, as it was to a juror was debated, and the decision postponed, that the "justices might be advised." But Newton, J., said that, "though the sheriff owed all the ill and malice that he could to the plaintiff or the defendant, yet if, in making the array, he truly made it, without showing any favor to one or the other, the array is good, and, if he puts upon it a juror 'suspectively *et nient* indifferent,' the whole array is quashed. And,

if a juror say that he will pass for the plaintiff, his saying is no cause for withdrawing him, unless it is found by the triors or by the court that he said this more for favor than for the truth of the matter. *Ad quod tota curia concordat.*" 20 Hen. VI. (1442) pp. 39, 40, pl. 9; Fitzh. Abr., "Challenge," 37. Here, so far as observed, the term "indifferent" was for the first time applied to a juror; and it appears clearly, by the judgment of the whole court, that a juror might be found indifferent although he had formed and expressed an opinion upon the merits.

"A panel was returned in the common bench. The defendant challenged the array for that it was favorably made for the party plaintiff, and prayed that it might be examined. Then it was examined by two triors of the same inquest, who were named by the judges, namely, the third and the ninth in the panel. * * * It was said by Frowyk (chief justice), that no sufficient freehold is a good challenge, and of this the party himself shall be sworn whether it is sufficient or not. Also, he said that it is a good challenge that he has nothing in the hundred, if the damages extend to forty marks, or that he is more favorable to the party plaintiff than to the party defendant, for that he hath said that if he should be impaneled he would pass for the party plaintiff." 21 Hen. VII. (1506) p. 29, pl. 10. Frowyk did not understand that he was overruling (7 Cow. 108, 125) the doctrine laid down by Babington in 7 Hen. VI., and by the whole court in 20 Hen. VI.; nor did the editor of the edition of the Year Book printed in 1679 (or possibly the original reporter), who cites the case 7 Hen. VI. in the margin. The language bears no such construction. It is merely an instance not uncommon, of mentioning a ground of challenge without stating whether it is for principal cause, or to favor. Fitzherbert was at that time, doubtless, engaged in compiling his abridgment, which was printed in 1514—only eight years later. It is possible, perhaps probable, that he was present in court, and heard Frowyk's *dictum*. It is not referred to in his abridgment. He seldom mentions mere *dicta*, but he would not be likely to omit it if he supposed it overruled, or cast a doubt upon, previous decisions. Brooke, who died in 1558, and whose work was published in 1568, in his abstract of the case, gives it as a *dictum* as follows: "By Frowyk, Justice: Not sufficient freehold is good challenge, and of this the

party himself shall be sworn if it is sufficient or not; and it is a good challenge that he has nothing in the hundred, where the damages are forty marks, or to say that he has reported that if he should be impaneled he would pass for the plaintiff, *tamen quære* of the hundred * * * for he ought to have in the hundred, or dwell there, in every cause of action; but, where the debt or damages are forty marks, he must have forty shillings of freehold, *quod vide* in the statutes." Brooke, Abr., "Challenge," 90. It is incredible that Brooke should thus criticise Frowyk's *dictum* touching the hundred, and pass without remark the discrepancy, if, in his judgment, there were any, between the other *dictum* and the law laid down by Babington, which he ("Challenge," 55) had already stated.

In attain "a juror was challenged for that he was especially laboured (by the other party) since he was sworn at the last term, and the triors found him indifferent, and he was sworn. And another was challenged for that he said that if he was sworn he would pass for the plaintiff, and he was withdrawn.

Another was challenged for that he was the plaintiff's servant, and it was so found. And the array of the tales was challenged for that the defendant offered, if the sheriff made the panel at his nomination, he should have ten marks. And the jurors who had been sworn found the tales not indifferently made—'*nient indifferent fait.*'" 21 Hen. VII. (A. D. 1506), p. 32, pl. 21. Here it is not expressly stated whether the challenge for the juror's statement was tried, and the juror found not indifferent, or whether the plaintiff submitted to the objection without a trial. It not unfrequently happened in those days, as in later times, that the evidence was so clear and incapable of rebuttal that the challenge was yielded to without demanding a trial. 7 Hen. VI., p. 40, pl. 7; 27 Hen. VIII., p. 26, pl. 4; 2 Rolle, Abr. 630, pl. 6. "A juror was challenged for malice that he had to the plaintiff, and found indifferent; and, when he came to the book to be sworn, he said that, notwithstanding the plaintiff had been a false harlot to him, yet he would find according to the truth. Deinshil showed this to the court, and prayed that he be tried by the triors, for his malice appeared by his words. Fitzherbert, J.: He has been once found indifferent, wherefore he shall not be tried again—to which the court agreed." 27 Hen. VIII. (1536), p. 21, pl. 10; Brooke, Abr., "Challenge," 4. A chal-

lunge to a juror, for that he said to one of the parties, "Provide you to pay, for if I am sworn I will give my verdict against you," was considered a challenge to the favor, and submitted to triors, who found the juror not indifferent, and he was withdrawn, in *Odill v. Tyrrell* (1610), 1 Bulst. 20.

In *Cook's Case* (1696), 13 How. State Tr. 311, 333, 334, Cook said: "My lord, before the jury is called, I am advised that if any of the jury have said already that I am guilty, or they will find me guilty, or I shall suffer, or be hanged, or the like, they are not fit or proper men to be of the jury." L. C. J. Treby replied: "You say right, sir. It is a good cause of challenge"—meaning a good cause of challenge to the favor, to be tried by triors, or, if the parties assented, by the court. He meant, and was understood to mean, not that by the mere utterance of those words, or any of them, a juror was, by intendment of law, disqualified, but that the expressions disclosed such a probability of bias that they ought to be submitted to and considered by triors on the question of indifference. It was the right of the crown to demand triors, and the submission to them of the question, not merely whether the juror had used those words, but whether, on the whole evidence presented, he stood indifferent. Triors were not demanded because there was no occasion for them. The court found (correctly or incorrectly), not as matter of law, but as matter of fact, that certain expressions, if made by the juror, would be scandalous misbehavior—a disgrace and dishonor to him, as an avowal of a mortal hatred to the accused, and a malicious resolution to convict him without regard to the evidence.

Upon this correct or incorrect conclusion of fact the court ruled, in accordance with long established law (49 Edw. III. p. 1, 49 Ass. 1; Fitzh. Abr., "Challenge," 100; Brooke, Abr., "Challenge," 25), that jurors could not be required to confess their own infamy; and the defendant, having no other evidence, was forced to challenge peremptorily those whom he suspected. That the court understood the words were used without qualification, and as equivalent to a declaration by the juror that, regardless of the evidence, he would find the defendant guilty, is apparent from the discussion of the question whether he could be asked and required to answer whether he had uttered the words as charged. Sergeant Dar-

nall for the defendant: "I think any man, my lord, that comes to serve upon the jury, may be asked any question that does not make him guilty of any offense or crime, or liable to any punishment. Now, if any of these gentlemen that are returned upon this pannel, before the summons have declared their opinion that the prisoner is guilty, or ought to suffer; with submission the prisoner may ask such a question, whether he have said so, yea or no. * * * L. C. J. Treby: You put it too large, Brother Darnall. You may ask, upon a *voir dire*, whether he have any interest in the cause. Nor shall we deny you liberty to ask whether he be fitly qualified, according to law, by having a freehold of sufficient value. But, that you can ask a juror or a witness every question that will not make him criminous, that is too large. Men have been asked whether they have been convicted and pardoned for felony, or whether they have been whipped for petty larceny, but they have not been obliged to answer; for, though their answer in the affirmative will not make them criminal, or subject them to punishment, yet they are matters of infamy, and, if it be an infamous thing, that is enough to preserve a man from being bound to answer. * * * A juror may be challenged, being an alien or being a villain; but, where the matter apparently carries crime or shame, it should be proved. The outlawry should be proved, and so should the being a villain. Yet that is no crime, though it be an ignominy. Darnall: But my lord, I take this to be no manner of infamy at all. There is nothing of crime, nor nothing of reproach, but only a declaring of a man's opinion: L. C. J. Treby: Truly, I think otherwise. I take it to be at least a scandalous misbehavior, and deservedly illspoken of, for any man to prejudge, especially in such a heinous matter. I think it a very shameful discovery of a man's weakness and rashness, if not malice, to judge before he hears the cause, and before the party that is accused could be tried. But it seems, by what the prisoner says, that he would ask all the jurors whether they have not said that he was guilty, or that they would find him guilty, or that he should be hanged, or the like, which (presuming him innocent) is to ask whether they have not defamed and slandered him in the highest degree, and to force them to discover that they have a mortal hatred to him, and come with a malicious resolution to convict him,

which admitting they are not punishable by our law, yet are things so detestably wicked and so scandalous as are not fit to be disclosed by and against themselves.

Darnall: Pray, my lord, what is more common than for a man to say before he is summoned to be upon a jury, when he hears a fact reported concerning such a one, to say, 'I believe he is guilty', or 'I am of opinion he is, and I am sure he will be hanged'? and yet there is no crime in this. L. C.

J. Treby: Truly, Brother Darnall, I know not how you may approve of such a man, but I'll assure you I do not. I take the question not to be concerning a man's discoursing suppositively; as if upon hearing news, or a report of clear evidence, a man should say, 'Supposing this to be true, such a man is guilty, and I should find him so if I were of his jury.' This might not be sufficient to set aside a juror. For this has been a general discourse among the subjects upon occasion of this conspiracy, and it imports that if evidence should not be true and clear he would acquit him, and so he is, as he should be, indifferent. But if a man qualified for a juror affirm positively that such a prisoner is guilty, and that he will find him so, whatever evidence or proof be given or made to the contrary, I think that may be a misdemeanor punishable as an owning and encouraging of falsehood, perjury, and injustice, and a contempt and scandal to the justice of the kingdom.

* * * Darnall: Our objection is not because it is an offense to declare a man's opinion upon a fact reported, but because it shows he has a settled opinion against the person of his guilt, and so he is not so equal a man to try him. L. C. J. Treby: And is that like an honest man and a freeholder of London (who ought to be indifferent), to come with a settled opinion against a man, when he is to be one of his jury?

* * * Truly, I think it reflects both dishonesty and dishonour upon him, and therefore these questions ought not to be asked. The question is not whether a man (if ever such a man there were) that hath so resolved and declared shall be sworn. No, he is not fit to serve upon a jury. But the question is, how this shall be discovered—by his own oath, or by other proof? I think it ought to be made appear by other proof, if true. * * * But if any man in this pannel have any particular displeasure to the prisoner, or be unindifferent, or have declared himself so, I do admonish and desire him to dis-

cover so much in general; for it is not fit, nor for the honour of the king's justice, that such a man should serve on the jury." Pages 334-338. In reading Cook's case, it is to be borne in mind that the only point adjudged was that the jurors could not be asked or required to answer the question whether they had used the words attributed to them. The question whether preconceived opinion would disqualify a juror, in the absence of motive to find for or against either party, was not raised or considered. What Darnall called a "settled opinion" against the defendant—styled by Parker, C. J., a "fixed belief," "fixed determination," "fixed opinion" (*State v. Howard*, 17 N. H. 189, 190-192, 195), the court considered as equivalent to—synonymous with—"a malicious resolution to convict him." The case lends no color of authority for the proposition to which it is sometimes cited—that at common law a previously formed and expressed opinion upon the merits disqualifies a juror. "Had the juror * * * been regularly challenged, triors would have been appointed and witnesses would have been called to prove that he had said the prisoner was guilty and would be hung. If the testimony had stopped here, possibly the triors would have found him not indifferent, or in other words, pronounced him disqualified from serving. But had it appeared on cross-examination, or by other witnesses, that he was totally unacquainted with the prisoner, and could have no personal ill will toward him, and that the opinion he had expressed was founded solely on the information he had received from a neighbor, the triors would, no doubt, have found indifferent." 9 Month. Law Rep. 201.

In *Laver's Case* (1722), 16 How. State Tr. 93, 136-138; *Barbot's Case* (1753), 18 How. State Tr. 1229, 1233; and *Tooke's Case* (1794), 25 How. State Tr. 1, 15—jurors were challenged because they had said that the prisoner ought to be hanged; that, if on the jury, they would hang him, or that they believed him guilty; and upon its being shown that they had so stated, they were set aside without objection or demand for triors, on the part of the crown. In *O'Coigly's Case* (1798), 26 How. State Tr. 1191, 1218, 1226-1230, before any juryman was obtained, Plumer, for the defendants, challenged Thomas Raikes "for cause," and John Foulkes was sworn. "Mr. Plumer: Did you see Mr. Raikes at the time of the arraignment of the prisoners? Yes. Did you hear him say

anything respecting the prisoners at that time? He * * * inquired the names of the prisoners separately. * * * He looked them all steadfastly in the face, quite close to them, clenched his fist, and exclaimed, 'Damned rascals!' Atty. Gen. (Sir John Scott): * * * That is no cause of challenge. Mr. Plumer: There can be no doubt, if the fact is believed, it proves that Mr. Raikes does not come here with that indifferent mind which every person who sits upon the life of a person ought to have. * * * Atty. Gen.: We are getting here into prodigious irregularity, and I feel it my duty to protect the gentlemen of the jury against this sort of attack. If my friend means to state any case of fact which he has to propose to the court, let him state that case, and let us have it tried by triors. Mr. Dallas (for the defendants): It is not only expressive of malice, but it furnishes a presumption that the juror has formed an opinion with respect to the particular case.

Atty. Gen.: I must interrupt this mode of proceeding. Mr. Justice Buller: Will you have it tried? Dallas: Yes, we will have it tried." Thereupon the court appointed two of the bystanders (not of the jury) triors. The witness Foulkes was again sworn, and testified in chief in substance as before. The attorney-general cross-examined him at length, and, in rebuttal, called Sir John Mitford, who testified that Mr. Raikes had expressed to him an extreme unwillingness to be upon the jury, stated the extreme inconvenience it would be to him, and that he had applied to the court to be excused. Buller, J., said to the triors: "Gentlemen, you will say upon the evidence you have heard whether you are of opinion that Mr. Raikes is a person who will try these prisoners indifferently, upon the evidence that may be given, or not." After consulting together, one of the triors said: "As the oath is taken against Mr. Raikes, we think he had better be omitted." After two jurymen were obtained, the defendants challenged J. Martyr for cause. Buller, J., directed the two already sworn as jurors to be sworn as triors. Benj. Rawson testified: "I heard him [Martyr] say that he was afraid the prisoners were guilty; and something more he said, I do not recollect what, but he ended it by saying, 'I hope they will be hanged if they are guilty.'" While the witness was being cross-examined, the defendants abandoned their challenge.

In *Sheridan's Case* (1812), 31 How. State Tr. 543, 634-637, a juror was challenged as bearing malice against the defendant, and not indifferent. Triors were appointed on the demand of the crown. The defendant offered, but was not permitted, to prove by the juror himself that he was an Orangeman, and, as such, had "taken an oath hostile to the Catholics of Ireland," and, having no other evidence, withdrew the challenge, and the juror was sworn.

In the case of *Tutchin* (1704), tried for libel (14 How. State Tr. 1095, 1100), E. P., being called, said "My lord, I desire I may be excused. I do not know Mr. Tutchin, for I never saw him in my life; but I have read his observators, and have several times publicly disallowed them, and therefore some may think I am prejudiced against him. * * * L. C. J. Holt: You must not be excused, unless the queen's counsel will. Mr. Montague: We challenge him on behalf of the defendant. Atty. Gen. (Sir E. Northy): Shew your cause. Mr. Montague: My lord, our cause is, that he himself looks upon himself as not indifferent. L. C. J. Holt: He says he has read some of the papers, and has publicly condemned them, * * * but he does not know the author. Mr. Whitaker (for the defendant): But he said he did not doubt but he was the author of them. Serj. Darnall (for the crown): He is the fitter man for a jury. * * * Mr. Montague: My lord, the matter we are contending for is, that one that is not altogether an indifferent person should not be on the jury.

Attorney-General: The question is not whether the papers are criminal, but whether the defendant is the author of the papers; and, if this gentleman knows him to be the author of them, he is proper to be on the jury. For the jury are, by law, to be of the neighbourhood of the place where the fact is alleged to be done, because they are presumed to know what is done there. And if this be the cause of challenge you may challenge all people, and so there could be no trial. L. C. J. Holt: He can not be challenged unless he has given his verdict before. Solicitor-General (Sir S. Harcourt): My lord, we can have no jury the way we are going. A juryman is not to be asked what his opinion of the cause is. * * * L. C. J. Holt: It is not a challenge. Mr. Montague: Surely, my lord, he is not so indifferent as he ought to be. Ho says he has already declared his opinion publicly concerning

Mr. Tutchin's papers. * * * L. C. J. Holt: Draw up your challenge in form, and it shall be considered. * * * I will have it done, that it may remain a decision in *perpetuam rei memoriam*. But, if you that are for the defendant will waive it, you may. * * * Solicitor-General: Is it a principal, or to the favor? L. C. J. Holt: A principal challenge, if any. * * * He makes it as a principal challenge. * * * It must be a principal challenge or nothing; for there can be no challenge to favor in the case of the crown." That the juror was finally excused by consent detracts little from the weight of the judgment. The jury were to pass, not upon the question whether the papers were or were not libelous—that was a question of law—but on the single question whether the defendant was the author of them, and Lord Holt held that the juror's understanding or opinion that he was the author was no objection to his serving. The precise extent and limitations of the doctrine that, against the crown, a juror could not be challenged for favor, are not clear. Co. Litt. 156a, and Hargrave's notes, 4, 5; 2 Hawk. P. C., c. 43, § 32; Trials per Pais, 203; 1 Chit. Cr. Law, 539; *Hampden's Case*, 9 How. State Tr. 1053, 1057-1061; *Parkyns' Case*, 13 How. State Tr. 75; *Rowan's Case*, 22 How. State Tr. 1033, 1037; *Muir's Case*, 23 How. State Tr. 117, 133, 134; *Despard's Case*, 28 How. State Tr. 346, 356, 357; *Edmonds' Case*, 1 State Tr. (N. S.) 785, 916; S. C., 6 E. C. L. 498, 499. But it is not material whether the holding that the challenge was "a principal challenge, if any," was correct or not, the only ground of that judgment being that a challenge to the favor could not be taken against the king.

In *Edmonds' Case* (1821), 1 State Tr. (N. S.) 785, 792, upon objection by the crown, the court refused to permit special jurymen to be asked whether they had expressed any opinion upon the case. The question was put to common jurymen or talesmen without, so far as appears, objection on the part of the crown.

In the course of the argument of a motion for a new trial (before Abbott, C. J., Bayley, Holroyd and Best, J.J.), Best, J., said (pages 887, 888): "Partiality to the prosecutor, or enmity to the prisoner, is the ground upon which a challenge is allowed. * * * You will find if a juror says he will give a verdict in a particular way, and that he will do this for

affection for either party, he is to be challenged. * * *

The question is whether what he said was from a knowledge he had, or from favour to one party more than to the other. If a man merely expresses his horror at a statement of facts, it does not prove him to be a person disqualified from attending upon a trial." The opinion of the whole court (after taking time to consider) was pronounced by Abbott, C. J., who said, among other things (pages 921-924): "The last ground of the motion for a new trial was the refusal of what has been called a 'challenge to the polls' in the case of the special jurymen. This challenge was made on the ground of opinions supposed to have been expressed by those gentlemen hostile to the defendants and their cause. There was no offer to prove such an expression by any extrinsic evidence, but it was proposed to obtain the proof by questions put to the jurymen themselves. The lord chief baron refused to allow such questions to be answered; and, in our opinion, he was right in this refusal. It is true, indeed, that he permitted similar questions to be answered by the talesmen; but in so doing, we think, he acted under a mistake. It does not appear distinctly in what precise form the question was propounded; but in order to make the answer available to any purpose, if it could have been received, it must have been calculated to show an expression of hostility to the defendants, or some of them—a preconceived opinion of their personal guilt, or a determination to find them guilty. Anything short of this would have been altogether irrelevant. The language of Mr. Sergeant Hawkins upon this subject (liber 2, c. 43, § 28) is, that if the jurymen 'hath declared his opinion beforehand that the party is guilty, or will be hanged, or the like, yet if it shall appear that the juror hath made such declaration from his knowledge of the cause, and not out of any ill will to the party, it is no cause of challenge.' So that, in the opinion of this learned writer, the declaration of a jurymen will not be a good cause of challenge, unless it be made in terms or under circumstances denoting an ill intention toward the party challenging. A knowledge of certain facts, and an opinion that those facts constitute a crime, are certainly no grounds of challenge, for it is clearly settled that a jurymen can not be challenged by reason of his having pronounced a verdict of guilty against another person charged by the same indictment." After citing Brooke,

Abr., "Challenge," 55, 90; Fitzh. Abr., "Challenge," 22; 7 Hen. VI. p. 25; 21 Hen. VII. p. 29; and 49 Edw. III. p. 1, he continues: "These ancient authorities show that expressions used by a jurymen are not a cause of challenge, unless they are to be referred to something of personal ill will toward the person challenging, and also that the jurymen himself is not to be sworn where the cause of challenge tends to his dishonour; and, to be sure, it is a very dishonourable thing for a man to express ill will toward a person accused of crime, in regard to the matter of his accusation. And accordingly we find it established in later times, namely, at the trial of Peter Cook, 13 How. State Tr., 334 * * * that such questions are not to be put to the juror himself. So that all the authority in the law on this head is against the defendants, and shows that the refusal of the lord chief baron to allow the proposed questions to be answered by the special jurymen was most proper, and agreeable to law." The opinion is also found in *Rex v. Edmonds*, 4 Barn. & Ald. 471.

Ramadge v. Ryan (1832), 9 Bing. 333, was an action for libel, in which the jury returned a verdict for the plaintiff for £400. An action brought by the plaintiff against Wakely for substantially the same libel was tried the day before, and the jury gave the plaintiff $\frac{1}{4}$ d. in damages. The defendant obtained a rule nisi for a new trial, on the ground that Hart, one of the jurors, was present during the trial of the suit against Wakely, and at its conclusion said, "I shall be on the jury to-morrow, and I will take care that the verdict does not go that way. he had heard quite enough, and that his mind was made up as to the verdict he should give." Hart deposed that his words were, "Well, I am surprised at such small damages. Had I been upon the jury I certainly should have given very heavy damages. I am upon the jury to-morrow." The rule was discharged for the reason that it was not established that Hart said "he would take care the verdict should not go the same way." The court held that the words charged would, but that the admitted words would not, have been a cause of challenge. Alderson, J., said: "Though the expressions which the juror admits himself to have used were imprudent, yet his entertaining a strong opinion on a former verdict is not incompatible with his giving a correct verdict on the case which was to come before him. * * * There is nothing in the lan-

guage which he admits which would lead one, independent of manner, to assume that he had prejudged the verdict he was himself to give."

In *Reg. v. Hughes* (1842), 2 *Craw. & D.* 396, 400 (Joy, Chal. 206, 207), on a challenge of a juror upon the ground that he had formed and expressed an opinion on the merits, Crampton, J., charged the triors as follows:

"The issue you are sworn to try is whether the juror called stands indifferent between the crown and the prisoner. It means this, whether he be partial to one side or the other; whether any partiality exists in the mind of the juror in favour of the crown, and against the prisoner. You can not enter into the mind of the juror to know what his feelings may be, but such must be ascertained by evidence. Here it is proposed to prove that the juror does not stand indifferent to the prisoner by proving a declaration made by him at the last assizes; and, according to the evidence of the witness, the juror did declare at the last trial of the prisoner that he had expressed an opinion of the guilt or innocence of the prisoner at the bar, or some of those charged with this crime. A mere expression of opinion as to the guilt or innocence of a person charged with a crime, arising out of any cause save malice or ill will, is no ground for challenging a juror. If, from the declaration made by this gentleman, you should be led to think he has any ill will toward the prisoner—any personal feeling against him—you will find against the crown, and in favor of the challenge; but if you think, from the notoriety of the facts naturally coming to the knowledge of the juror, he made a declaration of opinion on such matters, without any ill will or personal feeling toward the prisoner, you will find against the challenge." Counsel for the prisoner objected to this way of leaving the question to the triors, and submitted it should be whether the juror had in fact formed any opinion as to the prisoner's guilt or innocence. Crampton, J.: "The result of your argument would be that a second or a third trial could never be had in any county. I do not feel the least doubt upon the subject." Joy, Chal. 205.

The conclusion, upon all the English authorities, is that opinions formed upon the merits, and expressed even in a manner indicating malice or ill will, are a ground of challenge

on the favor only, and that mere expressions of opinion will not sustain the challenge.

Temple v. Sumner, Smith (N. H.), 226, decided in 1808, but not published until 1879, was a motion for a new trial because one of the jurors was present and heard the evidence at a former trial, had formed and declared an opinion against the defendant, and, when the jury were impaneled, untruly declared that he had not heard the cause tried, and had not formed or expressed any opinion. Smith, C. J.: "Supposing the facts established—and I think they are clearly established—was it good cause of challenge? It is among the most essential rights of our citizens to be tried by judges, which includes jurors, as impartial as the lot of humanity will admit. Const., p. 1, art. 35. This is no new right granted by the Constitution. The common law speaks the same language. 1 Sell. 475; Gilb. Com. Pl. 95, etc. The theory of the common law is that jurors should come to a trial with minds like white paper, upon which prejudice, passion or calumny, hope, interest, or fear have made no stain or blot. 'The law has so watchful an eye to the pure and unbiased administration of justice that it will never trust the passions of mankind in the decision of any matter of right.' 3 Burrows, 1856. * * * In England the distinction (between principal challenges and challenges to the favor) seems to have arisen from the circumstance that the writ to the sheriff to summon the jury laid down certain rules for his government, such as that the persons summoned should be free and lawful men of the county, of certain qualifications in point of property, by whom the truth of the matter might be better known, and who are in no wise of kin to either party. This writ was supposed to specify all causes of objection from partiality or incapacity. The word 'free' was understood to mean, not only one having freehold lands, but freedom of mind; one who stands indifferent—no more inclining to the one side than the other. If the person returned by the sheriff manifestly did not come within the intent of the writ, this was a principal challenge; and the court, on being ascertained of the fact, declared the juror incompetent. But experience soon showed that there might be other circumstances which induced a suspicion of partiality, though no express malice or favor. Here the court referred it to certain persons (the triors), to judge, in their discretion

and conscience, whether the juror was indifferent as he stood unsworn. * * * In some books we find it laid down that, if the juror hath declared his opinion, touching the matter, it is a principal challenge. In others, where the principal challenges are professed to be enumerated, we find this omitted. 3 G. Bacon, 756; 2 Tidd, Prac. 780; Trials per Pais, 141; Trial of Fries, 2d Append. 42. But neither of these quotes any authority. * * * The truth is that having previously declared an opinion may afford evidence—more or less strong, according to the circumstances—of suspicion, of bias or partiality. If a man had heard a cause, and should merely express an opinion in favor of one party, it would afford but slight evidence of bias or partiality. * * * Knowledge is no proof of malice, and knowledge of the particular cause no exception to a juror. Certainly it was none in ancient times. The circumstances attending the transaction must determine whether the juror is indifferent, or not. 5 State Tr. (Svo.) 125 (*Cook's Case*, 13 How. State Tr. 311-338). Our statute mentions this as a cause of challenge (Ed. 1865, p. 108). Indeed it allows the party to ask the juror if he is sensible of any prejudice in the cause. His prejudices may be proved, and everything which goes to show that he does not stand indifferent. Cases may easily be supposed where it would be extremely inconvenient to lay it down as a rule that the mere declaration of an opinion, especially a general opinion, should disqualify a juror."

Rollins v. Ames (1821), 2 N. H. 349, was a motion for a new trial on the ground that Martin, before whom, as a magistrate, the plaintiff took depositions read on the trial, was foreman of the jury. The court held the objection a cause of challenge to favor only. No other question of law was decided. Woodbury, J., says: "It is well known that magistrates are often selected for the purpose of taking depositions, who, if not unfriendly to the opposite party, are favorably disposed to him who employs them. This fact, connected with the circumstance that no person can easily hear the testimony on only one side of a cause without forming some opinion as to the case, furnishes a good ground for the presumption of a probable partiality. * * * This challenge, in England, is determined by triors, but here the court uniformly decide on its validity; and we entertain no doubt that

in the present instance it should prevail, if it had been taken seasonably." In other words, the court declared that, upon the evidence reported, they would have found, as matter of fact, that the juror was not indifferent.

State v. Webster (1843), 13 N. H. 491, was an indictment for larceny of a horse. The defendant was first tried on an indictment for entering a shop and stealing property therefrom. The evidence on this trial tended to prove that the defendant was also guilty of stealing the horse. Immediately after the jury in that case retired, a jury was impaneled in the present case. In reply to inquiry, several jurors stated that they were present during the former trial, and had formed an opinion from the evidence in that case. The counsel for the defendant objected to them on the ground that they were not impartial, and had prejudged the case, but the objection was overruled. It was held that the objection should have been sustained, and a new trial was granted. Gilchrist, J., says: "The commonest regard to justice would require that a party should not be compelled to trust even his property—much less, as in this case, his reputation and liberty—to the action of a tribunal by whom the merits of his case had been prejudged. It is immaterial in what manner a juror becomes biased. The question is, is he impartial, or is he not? He will be unfitted to do justice to the parties, whether he derive his impressions from reading the newspapers, from common report, from casual conversations with his neighbors, or from hearing witnesses testify in a court of justice." The case received little consideration. The distinction between challenges for principal cause and to the favor was apparently overlooked. It sufficiently appears, from the cases above cited, that one who was present as a spectator and heard the evidence in one case was not, for that reason alone, disqualified, by intendment of law, from serving as a juror in the next case, on substantially the same issue. No common law instance of a principal challenge for that cause is found in the books. The contrary was held in *Durell v. Mosher*, 8 Johns. 445, in *Atkinson v. Allen*, 12 Vt. 619, and in *Whitner v. Hamlin*, 12 Fla. 18. It was a ground of challenge to favor, and the judgment in *State v. Webster*, is to be considered merely as a determination of fact.

State v. Howard, 17 N. H. 171, decided in 1845, was an

indictment for murder. On a previous trial the jury failed to agree. Some of the jurors, on inquiry, answered that they had heard considerable said respecting the case, and, being objected to for that reason by the defendant, the court ordered that they be passed. But subsequently, after more than 150 jurors had been called, without completing the jury, the court ruled that it was not a sufficient legal objection to a juror that he had heard about the case; and, others having answered in the same way, the court refused to set them aside for that reason—they declaring that they were not aware that they had formed any opinion, and that they were not sensible of any bias. The defendant moved for a new trial, and introduced depositions of several witnesses showing that one of the jurors, “some two months before the trial, said at different times that he had no doubt that the defendant killed Phebe Hanson, and that he ought to be hung without judge or jury;” that another “said, a week or ten days after the murder, that if he was on the jury he would hang him [the defendant] certainly, and that at other times he said that he ought to be hung, and that if he was on the jury he would hang him;” and that two other jurors had made similar declarations. The affidavits of these jurors were introduced by the State, and each testified that he had no recollection of using such language; that he had in fact formed no opinion, and had no bias. Parker, C. J., says (pages 189, 190, 192, 195): “If it be assumed that all these jurors uttered the words attributed to them, it is hardly necessary to say that they are far from showing conclusively that the jurors did not in fact stand indifferent. We do not regard the testimony, standing alone, as impeaching the honesty of the jurors. It appeared, from the examinations made at the time of impaneling the jury, that the case had been a subject of conversation throughout all the county. It was a matter of course, under the circumstances attending it, that it should be so; and it is but natural that expressions like most of those attributed to these jurors should be made, not only without any settled opinions upon the subject, but merely as a matter of conversation, forgotten soon afterward. * * * But the case, as now presented before us, has led to inquiries whether the mere expression of an opinion by a juror in common conversation, without anything to show ill will, hostility or a fixed determination or belief, is

such a legal ground of challenge, under our statute, that the court are to inquire no further. * * * The weight of authority appears to be that the expression of opinion, unless under circumstances indicating malice or ill will, or, perhaps, a fixed determination, is only a ground of challenge to the favor. * * *

The court may, in its discretion, inquire under what circumstances the opinion was expressed, and, upon such inquiry, determine whether the opinion was merely a casual remark, which could have very little tendency to show bias, and which might be entirely overcome by other circumstances, so as to leave no doubt that the juror stands indifferent. If it should appear on such inquiry that the expression of opinion indicated malice, that would furnish conclusive evidence that the juror did not stand indifferent. * * * On this view of the case, the defendant is not shown to have had legal cause for principal challenge against the jurors to whom he now excepts, as having expressed opinions before the trial; and it follows, as a consequence, that he is not now entitled to a new trial, unless, upon the examination at this time of the circumstances shown in evidence, it appears that the jurors did not stand indifferent in the cause when they were impaneled. The evidence before us does not serve to show that these jurors did not stand indifferent. Still less is there anything indicating that they had any fixed belief, or any determination to find the defendant guilty; and the defendant therefore has not, in this view of the question and on this evidence, entitled himself to have the verdict set aside." Neither *Temple v. Sumner* nor *Rex v. Edmonds* was cited, though, undoubtedly, both would have been had they come to the notice of the court.

It is a circumstance worthy of note, and entitled to great, if not decisive, weight upon the question, that three courts—this court in 1808, the court of King's bench in 1821, and this court again in 1845—upon independent examination, came to the same conclusion, namely, that at common law the mere fact that a juror has formed and expressed an opinion upon the merits is not a ground of principal challenge, and does not necessarily disqualify him from serving on the trial, but is merely evidence to be presented and weighed with other evidence on a challenge to the favor.

In *March v. Railroad Co.* (1849), 19 N. H. 372, a juror "de-

nied that he was sensible of any bias;" but it appeared to the court "that he had strong feelings in relation to the case," and he was excluded. It was held that the finding, coupled with the exclusion, was, in substance, a finding that the juror's feelings were so strong that he did not stand indifferent; that upon his demeanor, and other circumstances, it might properly be so found, notwithstanding his denial of bias.

In *State v. Pike* (1870), 49 N. H. 399, 407, a juror testified that he had read the reports in the newspapers, and from them derived the impression that the defendant was guilty, and that, taking the reports to be true, he should think him guilty; that he paid little attention to such reports; that, notwithstanding the impression he had received from them, he thought he could try the defendant on the evidence without prejudice; and that he thought he had no opinion or impression which would prevent him from trying the defendant impartially on the evidence. The court found him indifferent, and he was sworn. It was held that the question of the juror's indifference was one of fact, to be decided by the court at the trial; that their decision stands like the verdict of a jury, to be reversed only when it is manifestly against law and evidence; and that there was no such ground for reversing their decision. This fully disposed of the question. It is, in substance, a judgment that a juror's impression or opinion on the merits is cause of challenge to the favor, and that the court's finding thereon, if warranted by the evidence, is final and conclusive. *State v. Jones*, 50 N. H. 369, 381.

The provincial act of 1754 provided "that the justices of the respective courts aforesaid are hereby directed, upon motion from either party in the cause to be tried, to put any juror to answer upon oath whether returned as aforesaid, or as a talisman, whether he doth expect to gain or lose by the issue of the cause then depending? Whether he is in any ways related to either party? And whether he hath been of counsel to either party, or directly or indirectly given his opinion or is sensible of any prejudice in the cause? And if it shall appear to the court, that such juror does not stand indifferent in said cause, he shall be set aside from the trial of that cause, and another appointed in his stead." Prov. Laws 1771, p. 191, § 3. This statute has ever since remained in force, without material alteration, except the amendments of 1842 and 1878, which do

not affect the present question. Laws N. H. (Ed. 1789), p. 45; Id. (Ed. 1797), p. 110; Id. (Ed. 1805), pp. 108, 109; Id. (Ed. 1815, p. 123; Id. (Ed. 1830), pp. 467, 468; Rev. St. c. 176, § 21; Gen. St. c. 194, § 22; Comm. Rep. 1878, c. 207, § 22; Gen. Laws, c. 213, § 23. It directed that jurors should, on motion, be required to answer whether they had given an opinion upon, or prejudged, the cause, although the answer might "touch the dishonour or discredit of the juror" (Co. Litt. 158b), and authorized the court to try the question of their indifference, instead of submitting it to triors. In all other particulars, at least, it merely re-enacted the common law. The question whether the whole statute, except as it affected the method of trial, was, or was not, declaratory of the common law, need not be considered.

"Indifferent" is used in the statute in its established common law sense. *Mayo v. Wilson*, 1 N. H. 53, 55. The statute does not declare that, upon proof of one or of all the causes mentioned, a juror shall be deemed disqualified. On the contrary, it assumes that a juror may have a minute and remote interest as, for example, in fines payable to the State or the county; may expect to gain or lose by the issue of the cause, as if his expectation is groundless; may be remotely related to one of the parties; or may have formed and expressed an opinion—and nevertheless be found indifferent. It "seems to imply," says Parker, C. J. (*State v. Howard*, 17 N. H. 194), "that the mere expression of opinion may not furnish cause for setting aside the juror, without further inquiry; for, although it provides that the juror may be inquired of 'whether he has, directly or indirectly, given his opinion, or has formed an opinion, or is sensible of any prejudice in the cause,' it does not provide that such an expression of opinion shall be a principal cause of challenge, or a conclusive reason for rejecting the juror, but enacts that, 'if it appears that any juror does not stand indifferent in any cause, he shall be set aside.'" So Smith, C. J., citing the statute, says: "All challenges are tried by the court. and if it appears to the court, judging on the broadest ground, that the juror does not stand indifferent in the cause, he is set aside." *Temple v. Sumner*, Smith (N. H.), 229. Interrogatories not mentioned in the statute may be put to jurors, and other witnesses may be examined. *Pierce v. State*, 13 N. H. 536, 554-556. Lord Mansfield declared "that any degree—

even the smallest degree—of interest in the question depending is a decisive objection to a witness, and much more to a juror. * * * The minuteness of the interest won't relax the objection. For the degrees of influence can't be measured. No line can be drawn but that of a total exclusion of all degrees whatsoever." *Hesketh v. Braddock*, 3 Burrows, 1847, 1856. But the jurors were in fact interested in the result of the trial of all offenders punishable by fine to the crown, or whose lands or goods were forfeited to the crown upon conviction. To kindred, also, as a ground of principal challenge, there must be a limit, notwithstanding Coke (Co. Litt. 157a) says, "And, how far remote soever he is of kindred, yet the challenge is good." Blackstone (3 Bl. Comm. 363) puts the limit at the ninth degree. Plow. 425; 1 Chit. Cr. Law, 541.

After the law required the jurors to be taken from the body of the county, and that from 48 to 72 be summoned at each term (A. D. 1730), there was, in civil cases, seldom occasion for challenges to the polls, and still less for trying them, if made, because, ordinarily, it was easy to obtain out of the whole number twelve persons satisfactory to both parties. Though the statutes had no application to crown prosecutions, challenges, even in criminal cases (except, perhaps, indictments for treason and other political offenses), became comparatively rare. The more enlightened views of courts and counsel led to a more liberal administration of the criminal law. In 1817 it was said that, "in the case of felony, challenges are very unusual." *Brandreth's Case*, 32 How. State Tr. 755, 776. "A challenge to the polls for cause seldom occurs in practice; for the counsel, either for the defendant or the prosecution, have only to intimate to the clerk of arraigns or clerk of the peace that they desire that a particular juror or jurors named may not be put upon the jury, and he will, in general, refrain from calling them." Archb. Cr. Prac. & Pl. 165. "In practice it has been usual, as a matter of courtesy, to allow peremptory challenges in civil cases and misdemeanors, but it is not a matter of right." Parke, B., in *Creed v. Fisher* (1854), 9 Exch. 472, 474. "No one * * * ever heard of any impediment being interposed to the defendant or plaintiff, in modern times, objecting to any number of jurymen without cause, and they are always withdrawn." Parke, B., in *Gray v. Reg.* (1844), 11 Clark & F. 427, 470; *Marsh v. Coppock*, 9 Car.

& P. 480; *Mansell v. The Queen*, 8 El. & Bl. 54, 103-106, 111-113; *Reg. v. Blakeman*, 3 Car. & K. 97. In practice, there was little occasion for invoking the strict law relating to the qualification of jurors. It fell into disuse, and a critical examination of it became unnecessary. Text writers stated merely the general doctrine, without going into particular distinctions, or attempting to draw the line accurately between challenges for principal cause and to the favor. Thus, Buller, writing in 1767, says: "If a jurymen be related to either party, or interested in the cause, or have declared his opinion, or have been arbitrator in the cause, it is a good cause of challenge; but I do not enter at large into these matters, because, since the 3 Geo. II., by which one panel is returned for the whole county, and not less than forty-eight in such panel, causes of challenge are not so minutely entered into as formerly." Bull, N. P. 307. "Many of those text writers," says Parke, B., speaking upon the law of challenge, "the more modern particularly, only repeat those who preceded them, and the more correct notion of the common law will be obtained from the older." *Gray v. Reg.*, 11 Clark & F. 427, 471. Upon this subject, implicit reliance can be put upon none later than the middle of the eighteenth century. Blackstone, for example, says it is a principal cause of challenge that the juror is the "party's master." 3 Bl. Comm. 363. That in this he is mistaken, the authorities are decisive. 21 Edw. IV. p. 67, pl. 52; 22 Edw. IV. p. 1, pl. 4; 14 Hen. VII. p. 2, pl. 6; Brooke, Abr., "Challenge," 71, 183; Fitzh. Abr., "Challenge," 64; Moore, 470; *Cham v. Matthew*, Cro. Eliz. 581; Cro. Jac. 21. It is probable that this and other errors on the subject found in the text-books were due to the liberality of modern practice—to mistaking the practice for the law.

Except on the rare occasions of difficulty in obtaining a jury, it has always been the practice in this State to excuse jurors who have heard about, or have knowledge of, the facts in issue, without stopping to inquire into the extent and character of their information. *State v. Howard*, 17 N. H. 171, 190, 194. Hence the impression, widely prevalent among those of the profession who have had no occasion to examine the subject, that a knowledge of any of the facts in issue legally disqualifies a juror. A similar practice has doubtless prevailed in other States. To this practice, in part, at least, may be due some of

the early and little-considered judgments—as, for example, *Tweedy v. Brush* (1786), Kirby, 13; *Blake v. Millspaugh* (1806), 1 Johns. 316; *State v. Godfrey* (1817), Brayt, 170—that at common law a juror is disqualified by a formed and expressed opinion.

The decisions in this country on the subject are numerous and conflicting. An extended review of them is not practicable, nor would it be profitable. A few of them are collected in 1 Bish. Cr. Proc. (3d Ed.), § 909, note, and in the notes to *Smith v. Eames*, 36 Am. Dec. 515, 521–534. In many of the States the causes of challenge are regulated by statute. The early departure from the common law has been corrected in some States by legislation, and in others by judicial action.

The New York courts, beginning with *Blake v. Millspaugh*, *supra*, held that an opinion formed—whether expressed or not, whether founded on knowledge or on reports, and though the juror believed he could try the case impartially—was a ground of principal challenge, and, as matter of law, a disqualification. *Pringle v. Huse*, 1 Cow. 432, 435; *Ex parte Vermilyea*, 6 Cow. 555; *People v. Vermilyea*, 7 Cow. 108, 121–130; *People v. Mather*, 4 Wend. 229; *People v. Bodine*, 1 Denio, 281; *People v. Honeyman*, 3 Denio, 121; *Cancemi v. People*, 16 N. Y. 501. Under this doctrine it was found difficult, in many cases, to obtain a jury. In 1844, Mary Bodine was indicted in Richmond county for the murder of her brother's wife and of his child, for arson, for burglary, and for receiving stolen goods. She was tried in that county on one of the indictments for murder, and the jury failed to agree. An application by the defendant for a change of venue was denied. *People v. Bodine*, 7 Hill, 147. Another attempt made to try her in that county on the same indictment failed, because of the impracticability of obtaining an indifferent jury. The indictments were then removed into the Supreme Court, and sent to the New York Circuit to be tried. In March, 1845, the defendant was tried on the indictment for murder, and found guilty. The verdict was set aside for error in impaneling the jury (*People v. Bodine*, 1 Denio, 281), and the case came on for a new trial in November, 1845, “at which time about three weeks were spent in the effort to obtain a jury, and over six thousand jurors were summoned; about four thousand were tried on challenges, and all set aside but ten.”

The parties being satisfied that a jury could not be obtained, the trial was suspended by consent. The venue was subsequently changed to Orange county, where the defendant was tried and acquitted. *People v. Bodine*, 1 Edm. Sel. Cas. 36, 82, 95. "Of these six thousand persons summoned as jurors, probably not fifty were legally disqualified from serving; and instead of fifteen days being fruitlessly expended, and thousands being called away from their business, half an hour would have sufficed for impaneling an impartial jury, had the process been regulated by the rules of the common law, instead of those arbitrarily imposed by the Supreme Court." 9 Month. Law Rep. 193, 199. One grave evil resulting from this departure from the doctrine of the common law was that it enabled any one to escape jury service by merely expressing an opinion on the merits. Joy, Chal. 191, 192, 207; 5 Alb. Law J. 81, 82. "It is reported that many (jurors) who were summoned in Bodine's case had the precaution, before being called, to remark to a bystander, 'I think Polly Bodine ought to be hanged;' and then, when his name was announced, he truthfully confessed that he had expressed an opinion, and was excused, of course." 9 Month. Law Rep. 193, 200. To obtain a jury in any case of public interest and notoriety was difficult. In the case of Foster, tried for murder in 1871, over 1,000 jurors were summoned, and a week's time consumed in getting a jury. 4 Alb. Law J. 281. To remedy the mischief, the legislature enacted, in 1872 (Laws 1872, c. 475), that "the previous formation or expression of an opinion or impression in reference to the circumstances on which any criminal action at law is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, shall not be a sufficient ground of challenge for principal cause, provided the person proposed as juror shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence, and that such opinion or impression will not bias or influence his verdict, and provided the court shall be satisfied that the proposed juror does not entertain such a present opinion as would influence his verdict as a juror." The act was re-enacted in Code Cr. Proc., § 376. *People v. Casey*, 96 N. Y. 115, 118. As construed and administered, it goes far toward restoring the common law. Under it the court holds that notwithstanding a juror has formed, ex-

pressed, and still entertains an opinion upon the merits, which it will require evidence to remove, yet if he declares on his oath that he believes, and the court finds, that he can render an impartial verdict according to the evidence, he is a competent juror. *People v. Willson*, 109 N. Y. 345, 351; *Balbo v. People*, 80 N. Y. 484; *Cox v. People*, Id. 500; *People v. Buddensieck*, 103 N. Y. 437. In *Stokes v. People*, 53 N. Y. 164, the act was held constitutional, upon the ground that it was intended to secure, and does secure, a fair and impartial trial. The court say (pages 171, 172): "Any act of the legislature providing for the trial otherwise than by a common-law jury composed of twelve men would be unconstitutional and void, and any act requiring or authorizing such trial by a jury partial or biased against either party would be a violation of one of the essential elements of the jury referred to and secured by the Constitution." It is, in legal effect, a judgment that the statute is declaratory of the common law.

It was held in Vermont that one who has expressed an opinion upon the merits is not a competent juror, although, when called at the trial, he testifies that he has then no opinion, and can try the case impartially upon the evidence. *State v. Godfrey*, *supra*; *State v. Clark* (1870), 42 Vt. 629. It is no objection to a juror that he heard the evidence at a former trial of the case and formed an opinion thereon, if he has not expressed it. *Boardman v. Wood* (1831), 3 Vt. 570. In *State v. Phair* (1875), 48 Vt. 366, the court were urged, but declined, to hold that an opinion formed upon the merits, though never expressed, disqualifies a juror. Royce, J., delivering the opinion says (page 377): "If any new rule is to be adopted, it seems to me it would be more reasonable not to make the formation and expression of an opinion the arbitrary test of a juror's competency, but to permit an inquiry to be made as to the facts and circumstances upon which the opinion was formed; and if, upon such inquiry, it should be found that the juror was free from bias or prejudice, and could and would fairly and impartially judge of the matters to be submitted to him, he should be held to be competent." This near approach to the common law was adopted in substance by the court, and declared to be the doctrine of the common law, in *State v. Meaker* (1881), 54 Vt. 112, 123. Several jurors who had formed opinions from reading the newspapers, and had expressed them,

but stated that their opinions depended upon the correctness of the newspaper reports, that they were conscious of no bias or prejudice for or against either party, and that they could try the case impartially according to the evidence, were there held competent. This seems to be the settled doctrine in that State. *State v. Meyer*, 58 Vt. 457.

In 1786, it was held in Connecticut that one who had given his opinion was disqualified from serving as a juror in the cause. *Tweedy v. Brush*, Kirby, 13. In the later cases the expression of opinion is held to be cause of challenge to the favor only, and the question of the juror's competency is determined by the court upon all the evidence. *State v. Potter* (1846), 18 Conn. 166, 171-175; *State v. Allen* (1879), 46 Conn. 531, 546, 547; *State v. Hoyt* (1880), 47 Conn. 518, 530, 531. "Nineteen-twentieths of the intelligent men of the county where a homicide has taken place, and the fact, with the circumstances attending it, has been published in the newspapers would be incapacitated from sitting as jurors, if the objections raised in this case were well founded. All of them would read the account, or hear the facts detailed by some one who had read them. Most of them would form just such opinions, or get just such impressions, as the jurors had in this case. And if we were to adopt the principles and sustain the objections which have been urged upon us, we should open our courts to just such judicial farces as the one which has recently been acted in the case of Foster, in the city of New York. That state of things we must avoid; and we are satisfied that the jurors selected under our system can be relied upon to try cases impartially, and upon the evidence given in court, notwithstanding they may have heard or read accounts of the transaction, and formed an opinion, if such it may properly be called therefrom. Opinions thus formed are not, in their nature, such as should disqualify a juror. If he is free from partiality or prejudice derived from any other source, his opinion is, as a matter of course, hypothetical, not fixed or settled, in the sense in which those terms are used, when used correctly, in the law. All men take newspaper statements as current news, liable to qualification, explanation or contradiction, and when qualified, explained or contradicted, they change their opinions or belief accordingly, as matter of course. * * * The mind of the juror having such an opinion, impression, supposition, or

belief * * * is certainly in no worse situation than the mind of a juror who has heard one side in court, making a *prima facie* case, is to hear the defense when made upon the other side, and give it its just weight. * * * The opinion must be formed in such a way, or be of such a character, that hostility or prejudice toward the prisoner may be inferred from its existence or expression. But hostility or prejudice can not, as a rule, be inferred from an opinion formed and expressed simply from reading or hearing stated, as current news of the day, the fact of a homicide, and the circumstances attending it. There should be found some other circumstances, of relationship, partiality, prejudice, hostility, or ill will—acting at the same time upon the mind, and giving it a bias, or the juror should be accepted. The court, in its determination, should be guided rather by the existence or the absence of such other circumstances, which might have affected the reports read or heard, or may be operating directly upon the mind of the juror and assisting the reports to create a bias or prejudice, which renders him not indifferent.” *State v. Wilson* (1871), 38 Conn. 126, 138-140.

In New Jersey, by reason of the practice, it came to be supposed that “the expression or even the formation of an opinion by a juror, as to the guilt of the accused, disqualified the juror, and was ground of principal challenge.” *Moschell v. State*, 53 N. J. Law, 498. The question was apparently for the first time judicially considered in *State v. Spencer* (1846), 21 N. J. Law, 196. It was there held that it is not a ground of principal challenge that a juror has formed and expressed an opinion founded upon either a knowledge of the facts, or upon information supposed to be true, and that a declaration of opinion, to disqualify a juror, must be such as implies malice or ill will against the prisoner. Hornblower, C. J., says (pages 198, 199): “It has been supposed that an opinion of guilt, founded upon newspaper reports or other information, or personal knowledge, disqualifies a man from being a juror. But this is not so. * * * And I have no hesitation in saying that a bystander who witnesses a homicide, or any other breach of the peace, is a perfectly competent juror—as much so as a witness to a bond or other contract between private parties would be on a trial concerning such bond or contract. * * * A declaration of opinion, to disqualify a juror, therefore, must

be such an one as implies malice or ill will against the prisoner, thereby showing that the person challenged does not stand indifferent between the State and him. This is the uniform language of the books, and cases which are of authority under our Constitution, as well as of the English courts, up to the present time." The question was re-examined, and the same conclusion reached, in *State v. Fox* (1856), 25 N. J. Law, 566, and *Moschell v. State* (1888), *supra*. In the former case (25 N. J. Law, 592, 593), Green, C. J., after citing Cook's case and other English authorities, says: "These cases, extending from the reign of Henry VI. nearly to the present time—a period of more than four hundred years—fully sustain the rule adopted in *State v. Spencer*. They show that by the rule of the common law the mere expression of an opinion as to the prisoner's guilt or innocence, not arising from malice or ill will, does not disqualify the juror, and that such declaration is, in itself, no evidence of the existence of malice or ill will. There are occasional *dicta* and cases to be found in the English books indicating that the mere expression of an opinion unfavorable to the prisoner is, in itself, a cause of challenge. But that such is not the recognized rule of law is abundantly evident from the fact that the question is never suffered to be asked of the juror himself, whether he has expressed such opinion, but the fact must be established by other evidence. The ground of this practice is that the question tends to bring scandal or infamy on the juror.

But if the question is merely designed to prove that the juror has expressed an opinion founded on his knowledge of the case, or from having read or heard the evidence, or from common rumor, unconnected with any feeling of malice or ill will, it can by no possibility involve any degree of infamy, reproach or moral turpitude. The rule of evidence applicable to the proof of the cause of challenge affords the strongest evidence of what the ground of challenge really is. * * * The very terms of the challenge—'*propter affectum*,' for affection—imply a moral bias, partiality or prejudice. A mind heated by passion, excited by controversy, or inflamed by party strife, labors under a moral bias. Where this is proved to exist, the challenge may be sustained. But knowledge is not prejudice. Wherever there is knowledge, from the very nature of the human mind, there must be opinion, and the strength of the

opinion will ordinarily be proportioned to the extent of the knowledge. In a community like ours, where intelligence of every kind is widely diffused, rapidly circulated, and eagerly sought after, to affirm that every one who acquires information of a crime, and forms—as every man capable of thought must form—some opinion in regard to it, is laboring under a moral bias which perverts the judgment, is to affirm what is contrary to all reason and experience, and in direct conflict with the truth. The doctrine, carried to its legitimate conclusions, excludes the most intelligent class of citizens, and those best qualified to serve as jurors. It practically disqualifies every man who reads and thinks. Instead of purifying it emasculates the jury box; and, where the experiment has been fully tried, the lessons of experience have, in this particular, confirmed the deductions of reason. There may be minds so constituted that every ray of light necessarily produces obliquity of vision. But that is not the normal condition of the mind, and it can not be wise to predicate a legal principle upon a mere anomaly.”

“I am not prepared to say,” says Andrews, J., in *Balbo v. People*, 80 N. Y. 495, 496, “that it is contrary to human experience, or the principles of mental philosophy; or that it may not frequently happen, that persons who have formed opinions of the guilt of an accused person from reports or statements, verbal or written, may not, as jurors, lay aside their prepossessions, and not only honestly and conscientiously endeavor to hear and decide the case upon the evidence, but be able, in fact, to divest themselves of the influence of their previous opinions. It may, I think, be safely affirmed that the consciousness of such prepossessions would in many cases induce on the part of jurors a cautious consideration and a more charitable construction of the evidence against the prisoner. * * * There may be cases where the opinion of the juror has been formed under circumstances which, in the judgment of all reasonable men, will prevent him, however conscientious he may be, from judging and deciding the case irrespective of his prepossessions. * * * The circumstances under which the opinion was formed, its strength, the fact whether the juror has any personal feeling against the prisoner, or exhibits any pride of opinion which may lead him to give too little or too much weight to evidence in favor of

or against the accused—these and many other considerations will enter into the judgment of the court, in passing upon the question of the juror's competency."

Justice required that the defendant should be tried by persons "best qualified to serve as jurors." Gen. Laws, c. 213, §§ 1, 4, 10. Such persons generally form, and frequently express, opinions of the guilt and the deserts of the accused, in a case of this kind, before the trial. Upon newspaper report, they often declare, with emphasis, that he ought to be hung, and that they would hang him if they were on the jury. There is no occasion for surprise when those who have been the most violent in such denunciation, being impaneled in his case, are led by the evidence and a sense of responsibility to take a firm stand on the other side. *State v. Howard*, 17 N. H. 171, 187, 188. In cases of startling crime, and others of public interest and notoriety, all intelligent residents of the county, "best qualified to serve as jurors," now stand in the position occupied by the residents of the immediate neighborhood of a like transaction 400 years ago. Few, if any, can be found who have not formed an opinion of more or less strength before the cause comes to trial. Information given by the public press differs in no respect from oral hearsay. Its weight and effect upon the mind depend in part upon the supposed reliability of the informer. However unreliable he may be deemed, it may create some impression. The difference between an impression and an opinion—even a "fixed and settled" opinion—is a difference of degree only. However weak it may be, further consideration or further information is necessary to change it. When persons drawn for jury service say they have formed opinions which it would take evidence to remove (*Hopt v. Utah*, 120 U. S. 430, 434, 435), or (as in this case) have formed opinions which are so strong that it would require evidence to change them, a portion of their testimony is superfluous. In belief, as in the material world, changes do not occur without reason. Opinions are not formed or abandoned without cause. If all the residents of the county (being otherwise competent), whose opinion of this case could only be changed by evidence, were excluded from the jury, the defendant could not be tried. The possibility or probability of obtaining jurors who had not formed an opinion was properly considered. *State v. Howard*,

17 N. H. 171, 196, 197. The question was not whether those examined as to their judicial competency could change their minds without cause, but whether they could and would disregard the information they had received and the opinions they had formed concerning the case, and render a verdict on nothing but the evidence given them during the trial. This was a question of fact, to be determined at the trial term. *March v. Railroad Co.*, 19 N. H. 372, 375, 376; *State v. Pike*, 49 N. H. 399, 406, 407; *Rowell v. Railroad Co.*, 58 N. H. 514.

Exceptions overruled.

DOE, C. J., did not sit. The others concurred.

NOTE.—*Competency of jurors.*—Under Code of Mississippi, declaring that any person, otherwise competent, who makes oath that he is impartial, shall be competent, as a juror, though he has formed an opinion as to the guilt or innocence of the accused, if he is not prejudiced. A juror who stated that he lived in the immediate neighborhood where the crime was committed, had heard it discussed, and had formed an opinion as to defendant's guilt or innocence, which was of such a fixed character that it would require evidence to remove it, but that he thought he could try the case fairly according to the evidence, was a competent juror. *Dan Green v. The State*, 72 Miss. 522.

The Code provides that: "Any person, otherwise competent, who will make oath that he is impartial in the case, shall be competent as a juror in any criminal case, notwithstanding the fact that he has an impression or opinion as to the guilt or innocence of the accused, if it appear to the satisfaction of the court that he has no bias of feeling or prejudice in the case, and no desire to reach any result in it, except that to which the evidence may conduct; but any juror shall be excluded, if the court be of opinion that he can not try the case impartially, and the exclusion shall not be assignable for error."

After quoting this section of the Code for the purpose of reconciling the present suit with the earlier decisions of the court, Mr. Chief Justice Cooper says: "An examination of the authorities cited in the note by Thompson & Merriam on Juries, to which we have referred, will demonstrate that the rule so frequently applied in the decisions in this State was against the decided weight of authority elsewhere, as was recognized by Judge Handy in his dissenting opinion in *Williams v. State*, 32 Miss. 397.

"Notwithstanding the remarks of the judges delivering the opinions of the court in *Logan v. State*, 50 Miss. 269, and *Alfred v. State*, 37 Miss. 296, we are entirely satisfied that it was within the legislative power to change the rule as has been done, and that in the present case the juror was rightly held to be competent."

No disqualification that juror did not understand English.—The fact that one of the jury sworn to try the prisoner did not thoroughly understand the English language is no ground, after trial and conviction, for holding that there has been a mistrial, or for granting a new trial. *Regina v. Earl*, 10 Manitoba R. 303.

"It is too late to challenge a juror after he has been sworn, even if the ground for challenge was not known at the time. *Id.*

"Ignorance of the English language would not in this Province (Manitoba) be a ground of challenge of a juror. *Id.*

"At the fall assizes of 1894, of the Eastern Judicial District, one G. W. Earl was tried before Mr. Justice Dubuc and a jury, and convicted of an attempt to commit rape. When the prisoner was afterward brought before the court to receive sentence, his counsel asked the court to reserve a case for the opinion of the court *in banc* on the following grounds: (4) Because, as claimed by the defense, one of the twelve jurors sworn to try the prisoner did not understand the English language, which was the language used at the trial, or was not sufficiently skilled in that language to fully understand the evidence, addresses of counsel and judge's charge.

"The prisoner's counsel procured the affidavit of the juror, and other evidence was produced before the court, and the judge found that the juror, Paul Ross, had not such knowledge of the English language as to fully and thoroughly understand at the trial, the evidence, the addresses of counsel, and the judge's charge. The judge stated he was satisfied that the defense was not aware, at the trial, of the fact that the juror, Paul Ross, was not familiar with the English language. The question for the opinion of the court was the following: "Is the fact that one of the twelve jurors, sworn to try the prisoner, did not thoroughly understand the English language, a sufficient ground for holding, under the circumstances, that there has been a mistrial, and that the prisoner should be granted a new trial?"

Mr. Chief Justice Taylor, after an exhaustive review of the cases, English and American, arrived at the conclusion above stated, and the two associate justices concurred with him in separate opinions. Of course, the fact that the juror spoke French and that he was otherwise qualified, may have had an unconscious weight with the court.

STATE V. GRIFFIN.

(66 N. H. 326.)

JURY: *Constitutional law—Trial by jury—Statute requiring payment of costs on appeal.*

General laws of New Hampshire, requiring an appellant from a sentence of a justice of the peace to pay certain fees is not an infringement of the constitutional right to a trial by jury, as the amount of such fees is less than the amount of those required by the provincial act of 1718, which was in force at the time of the adoption of that provision of the Constitution.

Appeal from a justice of the peace.

Henry Griffin was sentenced by a justice of the peace for assault and battery, and appeals. Case discharged.

The question is whether the defendant is bound to pay to the justice the fees for the appeal recognizance and copies required by Gen. Laws, c. 258, § 2, and to the clerk the entry fee required by Id. c. 290, § 4.

Ira Colby and *L. W. Barton*, for defendant.
S. L. Bowers, solicitor for the State.

CARPENTER, J. The statutes require the appellant to pay to the justice his fees for the appeal recognizance and copies, and to the clerk of the court the entry fee. Gen. Laws, c. 258, §§ 2, 3; c. 290, § 4. The defendant objects that these provisions are an infringement of his constitutional right of trial by jury.

All the provisions of the Constitution affecting prosecutions for crime have remained in force, without alteration, since it took effect, in June, 1784. The journal of the constitutional convention of 1791 was first published in 1877. Prior to that time, and until attention was called to that publication, it was generally, if not universally, understood that the whole of the present Constitution (excepting the amendments of 1851, 1877, and 1889) was submitted to the people, and adopted by them in 1792. *Pierce v. State*, 13 N. H. 536, 542; *Baker v. Holderness*, 26 N. H. 110, 114; *Rich v. Flanders*, 39 N. H. 375, 376; *Copp v. Henniker*, 55 N. H. 179, 191; *Perkins v. Scott*, 57 N. H. 55, 57, 78; *King v. Hopkins*, N. H. 334, 346; Commissioners Rep. 1878, p. 29, note; Gen. Laws, p. 40, note. Such was not the fact. *State v. Saunders*, 66 N. H. 39, 72. The convention first proposed and submitted to the people seventy-two amendments. They were separately voted upon. Forty-six were adopted, and twenty-seven were rejected. The only one affecting trial by jury related to civil causes, and was rejected. The action of the people rendered necessary further amendments regarding the senate, executive power, and council; and articles 25 to 66, inclusive, of the Constitution, as it stood until 1851, were submitted to the people in a body as a single amendment, and were adopted. 10 Prov. & State Papers, pp. 111-168.

"We regard it as a well-settled and unquestioned rule of construction that the language used by the legislature in the statutes enacted by them, and that used by the people in the great paramount law which controls the legislature as well as

the people, is to be always understood and explained in that sense in which it was used at the time when the Constitution and the laws were adopted." Opinion of the justices, 41 N. H. 551, 44 N. H. 635. "The trial by jury secured to the subject by the Constitution is a trial according to the course of the common law, and the same, in substance, as that which was in use when the Constitution was framed." *East Kingston v. Towle*, 48 N. H. 57, 64. "The right is the historical right enjoyed at the time it was guaranteed by the Constitution. * * * The exercise of the right may be regulated by legislation. Without some legislative regulation of it, or provision for it, it can not be enjoyed at all. The Constitution merely guarantees the right, and leaves to the legislature the duty of providing the means and methods by which it is to be enjoyed." *Copp v. Henniker*, 55 N. H. 179, 195; 198. It may, in some cases, be difficult to draw the line between legislative acts which merely regulate the exercise of a constitutional right, and acts which, under the pretence of regulating, materially impair, the right. *Davis v. School Dist.*, 44 N. H. 398, 404; *Attorney-General v. Colburn*, 62 N. H. 70, 73, 74; *Copp v. Henniker*, 55 N. H. 179, 196-198, 201, 202; *Rich v. Flanders*, 39 N. H. 304 *Green v. Biddle*, 8 Wheat. 1, 75, 76; *Bronson v. Kinzie*, 1 How. 311, 316-318. No such difficulty arises here.

The only objection to the statutes is that they make the expense to which the defendant is subjected in order to obtain a trial by jury, greater than it was when the Constitution was adopted. If the objection were well founded in fact, it might not, perhaps, necessarily follow that the substance of the right to jury trial, as it existed in such cases in 1784, is thereby materially impaired. *Davis v. School Dist.*, *supra*; *Beers v. Beers* 4 Conn. 535, 539; *Colt v. Eves*, 12 Conn. 243, 252, 253; *Curtis v. Gill*, 34 Conn. 49, 54; *In re Marron*, 60 Vt. 199. But in 1784 the person appealing from the sentence of a justice of the peace was compelled to pay in fees a much greater sum than is required by the present statutes. The provincial act of 1718 provided "that it shall be lawful for any person sentenced for any criminal offense by one or more justices of the peace out of sessions to appeal therefrom unto the next court of general quarter sessions of the peace to be held within this province; every such appellant recognizing with sureties in a reasonable sum, not exceeding five pounds, for his appearance at the court

appealed to, and to prosecute his appeal there with effect, and to perform and abide the order or sentence of the said court thereon which is to be final, and in the meantime to be of good behavior. And every such appellant shall attend the same rules and methods for bringing forward his appeal at the said court of general sessions of the peace, as is provided in case of appeal from a justice of the peace in civil cases to the inferior court, and shall pay the like fee for entering of his appeal as for the entering of a civil action, and the like fee to the jurors." Prov. Laws (Ed. 1726), p. 70; Id. (Ed. 1761), pp. 1, 2; Id. (Ed. 1771), pp. 69, 70. In effect, appellants were required to take the same steps, and pay the same fees, in criminal as in civil cases. *Copp v. Henniker*, 55 N. H. 197. In civil cases, appellants were required to produce in the court appealed to "attested copies of the writ, judgment and all the evidence filed." Prov. Laws (Ed. 1761), pp. 3, 4. The act of 1718 was repealed September 15, 1792, and the act of February 9, 1791 (Laws, Ed. 1797, p. 53), which merely required the appellant to recognize with sufficient sureties for his appearance at the court appealed to, and to prosecute his appeal there with effect, abide the order of court thereon, and in the meantime to be of good behavior, went into effect at the same time. Laws (Ed. 1805), pp. 398-401, 403. By the fee bill in force in 1784, the justice's fees for the appeal and recognizance were four shillings; for the copies, one shilling a page of 224 words; and for his certificate thereon, two shillings; the entry fee in the court of quarter sessions was ten shillings (the same as the entry fee of a civil action in the inferior court); and the juror's fees were six shillings and sixpence. Prov. Laws (Ed. 1771), pp. 83, 85, 86, 167. If the copies comprised ten pages, the appellant, in order to secure a jury trial, was compelled to pay 32 shillings and sixpence, or \$5.42. Under our present statutes he is required to pay the justice, for the appeal and three recognizances, 68 cents; for the copies, ten pages, \$1.70, and certificate thereon, 15 cents; and the clerk for the entry fee, \$1.20; in all \$3.73. Gen. Laws, c. 290, §§ 2-4; *Fowler v. Tuttle*, 24 N. H. 9, 20. If the changed value of money be considered (*Copp v. Henniker*, 55 N. H. 196), the burden now imposed on the right of trial by jury in such cases is not half so large as it was at the time of the framing and adoption of the Constitution. Case discharged.

DOE, C. J., did not sit. The others concurred.

NOTE.—*Trial by jury—Violation of ordinance.*—Under 16 St. at Large, p. 467, § 2, conferring on the recorder of the city of Charleston all the authority of a trial justice in criminal matters, and Code Cr. Proc., § 20, providing that every person charged with an offense before a trial justice shall be entitled, on demand, to a trial by jury, a person charged before the recorder of Charleston with violation of an ordinance is entitled, on demand, to a jury trial. *State v. Larkins*, 44 S. C. 362.

After reviewing the history of the police court of the city of Charleston, Mr. Justice Gray says: One of the rights of a prisoner charged with the violation of an ordinance, when tried before a person clothed with the powers, authority, and jurisdiction of a trial justice, is to have a jury to pass upon his innocence or his guilt. *Town of Lexington v. Wise*, 24 S. C. 163; *Town Council v. Ohlandt*, Id. 153; *State v. Williams*, 40 S. C. 373, Section 20, Code Cr. Proc., provides that every person arrested and brought before a trial justice charged with an offense within his jurisdiction shall be entitled, on demand, to a trial by jury. Although the question presented in this case was not involved in the case of *City Council v. Brown*, *supra*, the principles therein announced are conclusive of this case. After a careful consideration of that case, this court sees no reason to change its views therein announced. The authorities are not entirely uniform on the subject, but I should say that in all jurisdictions which regard the violation of a city ordinance as a criminal offense, the accused ought to be entitled to a trial by jury should he demand it.

The Queen v. Riley.

(Queen's Bench Division, 1896, Vol. 1, p. 309.)

FORGERY: *Obtaining money by forged instrument—Forged telegram.*

The prisoner was indicted under s. 38 of the Forgery Act, 1861, for obtaining certain money by means "of a certain forged instrument, to wit, a forged telegram." It appeared that the prisoner, who was a clerk in a post office, sent to a bookmaker a telegram offering a bet on a certain horse for a certain race. The telegram purported to have been handed in prior to the running of the race, and the bookmaker accepted the bet and ultimately paid the amount won on that understanding. In reality the telegram was dispatched by the prisoner after he had received the news that the race had been won by the horse in question. *Held*, by Hawkins, Mathew and Wills, JJ. (Lord Russell of Killowen, C. J., and Vaughan Williams, J., doubting), that the telegram was a forged instrument within the meaning of s. 38, and that the indictment was good.

Case reserved for the consideration of the court by Kennedy, J.

The prisoner was indicted under s. 38 of 24 and 25, Vict. c. 98, for that he "feloniously did cause and procure to be delivered and paid to one Henry Dorber certain money, to wit, the sum of nine pounds, the properties and moneys of George Crompton and Samuel Radcliffe, under, upon and by virtue of a certain forged instrument, to wit, a forged telegram; that is to say, a forged message and communication purporting to have been delivered at a certain post office, to wit, at Royal Exchange, Manchester, for transmission by telegraph, and to have been transmitted by telegraph to a certain other post office, to wit, the head post office at Manchester, with intent thereby then to defraud, he the said Henry Riley then well knowing the same forged instrument to be forged, against the form," etc.

A second count charged him in similar terms with endeavoring to commit the same offence.

It appeared that the prisoner was a clerk in the telegraph department of the head post office of Manchester. He had obtained from Dorber permission to make bets in his name with Messrs. Crompton & Radcliffe, who were bookmakers, and with whom Dorber was in the habit of doing business. On June 27, 1895, the race known as the Newcastle Handicap was to be run at 2:45 P. M., and on that day the prisoner sent to Crompton & Radcliffe, in the name of Dorber, a telegram in these words—"Three pounds, Lord of Dale." The telegram purported to have been handed in at the Royal Exchange office at Manchester at 2:40 P. M., and to have been received at the head office at 2:51 P. M., from which office it was transmitted to Crompton & Radcliffe. In reality the telegram was not handed in at the Royal Exchange office at all; but it was dispatched by the prisoner from the head office after the news had arrived there that the race had been won by Lord of Dale. Messrs. Crompton & Radcliffe, acting on their usual practice, and believing that the bet was offered before the race was run, accepted it at the current odds of 3 to 1 against Lord of Dale, and in the result credited Dorber with 9%, which in due course would be received by the prisoner. No suggestion of fraud was made against Dorber. The prisoner pleaded guilty. The questions on which the opinion of the court was asked by the learned judge were:

(1.) Whether the telegram was a forged instrument within

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the meaning of s. 38, and whether the prisoner could be convicted on the indictment.

(2.) Whether the prisoner by pleading guilty must be taken as having admitted the facts appearing on the depositions.

The Solicitor-General (*Sir R. B. Finlay, Q. C.*), *McCall, Q. C.*, and *Cusserley*, for the Crown.

F. H. Mellor, for the prisoner.

Cur. adv. vult.

February 3. HAWKINS, J., read the following judgment: The main question for us to decide is whether the telegram upon which this indictment was preferred is a forged instrument according to the true interpretation of s. 38 of 24 and 25 Vict. c. 98.

Messrs. Crompton & Radcliffe are bookmakers at Manchester. Their practice is to accept bets on horse races offered them by telegram by persons desirous of backing horses, provided that on the face of the telegram it appears to have been handed in by the sender at a time earlier than that fixed for the running of the race upon which the bet is offered. On June 27 last a horse named Lord of Dale was about to run in the Newcastle Handicap, and the time fixed for the running of that race was 2:45 P. M. The prisoner on the afternoon of that day sent to Crompton & Radcliffe, in the name of a person named Dorber, a customer of theirs, and who had authorized the prisoner to use his name, a telegram which on the face of it purported to have been handed in at the Royal Exchange branch post office in Manchester at 2:40 P. M., and to have been received at the head office at Manchester at 2:51 P. M., whence it was sent out to Crompton & Radcliffe. The body of it was in these words—"Three pounds, Lord of Dale." The starting price odds against Lord of Dale at the time when the telegram purported to have been handed in were 3 to 1. This telegram was received by Crompton & Radcliffe at 3:15 P. M., and the bet was accepted by them in the ordinary course. Lord of Dale won the race, and upon the faith that the telegram had been handed in as it purported to have been, Crompton & Radcliffe in due course paid Dorber, or allowed him in account, the amount won by him, namely, the sum of 9*l*. The telegram was in fact not handed in at or sent from

the Royal Exchange office at all, but was dispatched by the prisoner from the head office in the form in which it reached Crompton & Radcliffe after the race had been run and won. It is fair to Dorber to say that it was not suggested that he was a party to that fraud.

By the 24 and 25 Vict. c. 98, s. 38, "Whosoever with intent to defraud shall demand, receive, or obtain, or cause or procure to be delivered or paid to any person, or endeavour to receive or obtain, or to cause or procure to be delivered or paid to any person, any chattel, money, security for money, or other property whatsoever under, upon, or by virtue of any forged or altered instrument whatsoever, knowing the same to be forged or altered," shall be guilty of felony.

The prisoner was indicted under that section for procuring, with intent to defraud, the payment to Dorber, "by virtue of a forged instrument, to wit, a forged telegram, that is to say, a forged message and communication purporting to have been delivered at a certain postoffice, to wit, at Royal Exchange, Manchester, for transmission by telegraph, and to have been transmitted by telegraph to a certain other postoffice, to wit, the head postoffice at Manchester aforesaid, with intent then to defraud, he, the said Henry Riley, then well knowing the same forged instrument to be forged against the form of the statute, etc., and against the peace," etc. There was a second count varying the charge, to which I need not refer.

To this indictment the prisoner pleaded guilty; but the learned judge (Kennedy J.), before whom the case came on to be tried, entertaining a doubt whether the telegram was an instrument within the meaning of s. 38, reserved that question for the consideration of the Court for Crown Cases Reserved; and also desired the opinion of the Court as to the sufficiency of the indictment.

As to the indictment assuming the telegram to be an instrument within the meaning of the 38th section, I think the indictment sufficiently describes it. I consider that it would, after a plea of guilty, have been sufficient, under s. 42 of the Act, even had the indictment been for forging the instrument. *A fortiori*, it is so upon this indictment, which is not for forgery, but for procuring money to be paid by virtue of a forged instrument. I think it amply sufficient. See *Taylor v. Reg.* 1 Q. B. 25.

I proceed to discuss the questions reserved for our consideration. Whether the telegram described in the case constitutes a forged instrument in law; and whether it is such an instrument as is contemplated by section 38.

My answer to both these questions is in the affirmative.

In 4 Blackstone's Commentaries, 247, forgery at common law is defined as "the fraudulent making or alteration of a writing to the prejudice of another man's right." I seek for no other definition for the purposes of the present discussion. That a postal telegram is a writing is to my mind clear. It originates in a written message addressed and signed by the sender, and delivered by him into the post office of despatch for the express purpose that it shall, in the very words in which it is penned, be transmitted by means of an electric wire to another post office, which I will call the arrival office, and that it shall there again on its arrival be committed to writing *verbatim et literatim*, and that such last mentioned writing shall be handed to the person to whom it is addressed. The writing delivered in at the office of despatch is the authority of the postmaster to transmit the message, and of the postmaster at the arrival office to commit it to writing and to deliver it to the addressee as the sender's written message to him. This message sent out from the arrival office, is, in my opinion, as binding upon the sender as though he had written it with his own hand. If I am right in this, it follows, that an offer by telegram accepted by telegram, might well create a contract sufficient to satisfy the Statute of Frauds between the sender and the addressee, and a verbal offer accepted by telegram might create an ordinary contract. For this there is the authority of the Court of Common Pleas so long ago as 1870. See *Godwin v. Francis*, L. R. 5 C. P. 295. Assuming the telegram to be such a writing as I have stated, a bare reading of the contents of it, coupled with the admission of its falsity and of the purpose for which it was made, are overwhelming to establish that it was fraudulently made to the prejudice of another man's right, and thus a forgery at common law. For this I need only cite the judgment of Blackburn, J., in *Reg. v. Ritson*, L. R. 1 C. C. 200, at page 204: "When an instrument professes to be executed at a date different from that at which it really was executed, and the false date is material to the operation of the deed, if the false

date is inserted knowingly and with a fraudulent intent, it is a forgery at common law."

In this case, unless the telegram was dated and despatched before the race was run it would have been inoperative. The time of despatch was therefore material; falsely to write the telegram so as to make it appear that it was sent in for despatch before the race was run, when it was not sent in till afterwards, was to make it appear on the face of it to be that which it was not.

The more vexed questions, however, are whether the writing can be treated as an instrument, and if so, whether it is such an instrument as is contemplated by the 38th section, the contention for the prisoner being that it can not properly be treated as an instrument at all, and that, even if it can, that the 38th section has reference only to such forged legal or commercial instruments as are mentioned, and the forgery of which is made felony in the earlier sections of the statute. After much consideration, I have formed an opinion adverse to the prisoner on both these points.

Now, can this telegram properly be called an instrument? I am not aware of any authority for saying that in law the term "instrument" has ever been confined to any definite class of legal documents. In the absence of such authority, I can not but think the term ought to be interpreted according to its generally understood and ordinary meaning, as stated in the dictionaries of Dr. Johnson and of Webster. Both these give definitions: first, how the word is to be treated when applied to a chattel, namely, as "a tool used for an work or purpose." When applied to a writing, Dr. Johnson defines it as "a writing—a writing containing any contract or order." Webster's definition as "a writing expressive of some act, contract, process, or proceeding." When used generally, Dr. Johnson speaks of it as "that by means whereof something is done." Webster, as "one who, or that which, is made a means or caused to serve a purpose." These definitions cover an indefinite variety of writings, whether penned for the purpose of creating binding obligations, or as records of business or other transactions.

Every one of the documents mentioned in the statute is unquestionably an instrument, and intended to be so treated. Throughout the statute it is evident the Legislature attached

no rigid definite meaning to the word, for it is used in a variety of senses, all falling within one or other of the definitions of Dr. Johnson and Webster, to which I have referred. Thus, in s. 1 of Act, the word is used to signify a document having thereon affixed a counterfeit of the Great Seal. In ss. 9-14 the word is used to denote the tool or implement to be used for making a peculiar kind of paper. In ss. 16, 17, 18 the word is used to indicate tools for the manufacture of paper, plates, or implements to be used for carrying out forgeries. In s. 21 the expression is "testamentary instrument." In s. 29 the word is applied to written or printed documents made evidence by Act of Parliament. In s. 33 it is applied to writings purporting to be made by the Accountant-General of the Court of Chancery, etc. In s. 34 it refers to recognizances.

To most of the forged documents mentioned in the sections before s. 38 and declared to be felonies, the term "instrument" is not applied at all, although no doubt could be suggested that they are intended to be treated as instruments within the meaning of the Act.

It will not, of course, be denied that there are very many instruments of an important character, commercial and otherwise, the forgery of which constitutes only offenses at common law. I do not, for instance, find that the forgery of an ordinary written contract (not under seal or specially named in the statute) is a felony. So also a certificate of ordination, though the forgery of it is a mere common law offense, was nevertheless spoken of as an instrument by Blackburn, J., in *Reg. v. Morton*, L. R. 2 C. C. 22. I call attention to these undeniable facts for the purpose of showing that there are many written documents of an important character beyond those mentioned in s. 38, to which the words "any instrument whatsoever" used in that section apply in addition to those documents mentioned in the statute.

In my view of the case, the telegram in question is an instrument of contract; it is the instrument which completed the wager offered by Crompton & Radcliffe to those who were able and disposed to accept it (see *Carlill v. Carbolic Smoke Ball Co., Limited*, 2 Q. B. 484 [1892]; 1 Q. B. 256 [1893], and the cases there cited), and thenceforth an obligation was imposed upon each party in honour to fulfil it according to the result of the race. I say in honour because, though it was

clearly not an illegal contract, it could not be enforced by any legal process. In virtue of it, and upon the assumption that the telegram was what it purported to be, Messrs. Crompton & Radcliffe paid the 9%.

Assuming the document to be an "instrument," I come to the only remaining question, whether it is such within the meaning of s. 38 of the Statute. Why should it not be so? It is contended that the section has reference only to such instruments as are mentioned in the earlier sections of the statute, and that s. 38 applies only to those forged instruments which are punishable as felonies.

Such a construction is, I think, erroneous. There is no definition of the word "instrument" in the statute to fetter us in giving to it the ordinary and general interpretation. It was clearly the intention of the Legislature, by s. 38, to create a new offence.

If it had been the intention of the Legislature to limit the operation of the section to felonious forgeries, how easy it would have been to use appropriate language for that purpose.

So far from doing this the Legislature, having used the term "instrument" in a variety of senses all falling within one or another of the definitions I have above referred to, proceeds, in s. 38, to use language which, read in its ordinary sense, comprises every description of written instrument. What simpler, stronger or more comprehensive words could they have employed than "any forged or altered instrument whatsoever" to convey an intention that every forged instrument should be covered by it, whether the forgery was a felony by statute or a misdemeanor at common law? I think the Legislature intended exactly what it has said, and I feel strengthened in this view by the declaration of Mr. Greaves, Q. C. (who had much to do in the framing of the Criminal Consolidation Acts, of which this is one), in that chapter of his work relating to these statutes. (The Criminal Law Consolidation and Amendment Acts of the 24 and 25 Vict., with notes and observations by C. S. Greaves, London, 1861), which treats of the construction of them, wherein he says: "The word 'who-soever' is used throughout these acts in the widest sense, so as to include every person capable of becoming a criminal." There is no reason why the word "whatsoever" should not be interpreted in a similar spirit.

As to the word "any" he says: "It is also used in like manner so as to include every person or thing, or, at least, every person or thing other than the person or thing previously mentioned." Speaking of the expression "any other," he illustrates its intended interpretation by saying that the words "gunpowder or any other explosive substance" in s. 19 of the Offences Against the Person Act are intended to include every explosive substance. He points out, also in the latter part of that chapter, that (for reasons he has given) any argument as to a difference in the intention of the Legislature which may be drawn from a difference in the terms of one clause from those in another will be of no weight in the construction of such clauses. Moreover, in a note to the sections now under consideration, he says: "This clause is intended to embrace every case of demanding, etc., any property whatsoever upon forged instruments." I think no argument against the interpretation I have put upon s. 38 can be derived from s. 39, immediately following, for it expressly limits the operation of that section to statutory forgeries by enacting that whether such forgeries are created by that or any other Act the persons charged with them may be indicted as offenders against that Act. Again, in s. 40, the operation of which is confined to statutory forgeries, it is expressly and unmistakably so limited. Sect. 41 deals with the question of venue in all cases of forgery, expressly stating that it shall apply to all forgeries, whether by statute or at common law. Sect. 42 deals with what shall be a sufficient description in an indictment of "any instrument charged as a forgery," while s. 44, which makes it unnecessary to allege an intent to defraud any particular person, admittedly covers forgeries of every description without any exception, and expresses that intention by the very same words used in s. 38, "any instrument whatsoever." Is it possible that the Legislature, who clearly were alive to the difference between common law and statutory felonies, can have intended that a different construction should be put on these same words when used in s. 38?

The result is that, in my opinion, the conviction ought to be affirmed.

In regard to a question suggested in the case, whether a person by pleading guilty to an indictment thereby admits the truth of the facts stated in the depositions, I think it right

to express my opinion that he does not. He admits simply that he is guilty of the offence as charged in the indictment, and nothing more.

LORD RUSSELL OF KILLOWEN, C. J., read the following judgment of

WILLS, J. The only question in this case is whether a post office telegram is an instrument within the meaning of 24 and 25 Vict. c. 98, s. 38.

After a careful study of the Act, I am of opinion that it is so. The act is not very artistically drawn, and the words "instrument," "document," and "writing" are used in a manner which makes it sometimes difficult, at first sight, to say whether a real distinction is intended by the use of different words. Sections 1-26, 28, 30, 32, 35, 36, 37 and 40, all relate to instruments or documents of various kinds known by definite designations, and so described. They, therefore, throw no light upon the present question.

Section 27 relates to the forgery of "documents" or "writings" intended to be used in evidence. Any writing so used would, in ordinary legal phraseology, be called part of the documentary evidence in the case, and probably this section would have been construed as including every description of writing so used, if the words "or writing" had been omitted.

Section 29 relates to the forgery of "instruments" made evidence by Act of Parliament. The same remark applies. Such "documents or writings" must necessarily be of a more or less formal character, and the phrase "document or writing" in this section would appear to mean exactly the same thing as "instrument" in s. 29.

The same remark applies to s. 33, where the corresponding phrase is "instrument or writing." In s. 34, the word "instrument" must, from the nature of the enactment, refer to writings of a formal character.

In s. 39, which relates to the forgery of "instruments or writings" designated in Acts of Parliament by any particular name or description, it is obvious that the meaning of the clause would have been exactly the same if the words "or writings" had been omitted.

Sects. 40-45 are a group of enactments for facilitating procedure and obviating mere technical difficulties. There is no

reason why they should not have the widest construction and be applied to every kind of offence which, either by statute or at the common law, constitutes a forgery.

On the contrary, there is every reason why sections inserted for the purpose of advancing justice by getting rid of mere useless technicalities should be applied to forgeries of every description. Some of these sections are older than the Act of 1861. In all that is material to the present discussion s. 42, which makes it unnecessary in the indictment to do more than describe the forged writing by any designation by which it may be generally known, is a repetition of 14 and 15, Vict. c. 100, s. 5; and s. 44, which makes it unnecessary to specify or prove more than an intent to defraud generally, is a repetition of part of s. 8. of the same Act, whilst the rest of the same s. 8, which applies the same rule to indictment obtaining money by false pretences has been separately reenacted in the Larceny Act (24 and 25 Vict. c. 96), s. 88. In s. 42 the expression used is "any instrument," and in s. 44 "any instrument whatsoever."

My own experience in drawing indictments goes back to 1851, and, in my experience since that time, it has been the practice to treat ss. 42 and 44 as applying to forgeries at common law, as well as to statutory forgeries. Inquiry has satisfied me that the experience of others widely conversant with the subject agrees with my own.

The phrase used in section 38, under which the present question arises, is, "any instrument whatsoever." There can be no difference in meaning between this phrase and either of those used in ss. 42 and 44. It would be most unwise to throw a doubt upon the correctness of the interpretation put ever since 14 and 15 Vict. upon the words used in ss. 42 and 44, nor is there the slightest ground for doing so; and the only question is, whether there is any more reason for restricting the meaning of "instrument" in s. 38 than there is in those sections. I can see none.

It seems to me obvious that the words "instrument," "document" and "writing" have not been selected for any particular logical reason to be used in any particular section, and that whether they are to have a restricted or a general sense must be gathered from the nature of the particular enactment. I have pointed out some sections where the context does neces-

sarily restrict the application; but even there it is rather the application than the meaning of the term adopted that is so narrowed.

Section 38 provides that "whosoever, with intent to defraud, shall demand, receive, or obtain, or cause or procure to be delivered or paid to any person, or endeavour to receive or obtain, or to cause or procure to be delivered or paid to any person any chattel, money, security for money, or other property whatsoever, under, upon, or by virtue of any forged or altered instrument whatsoever, knowing the same to be forged or altered, or under, upon, or by virtue of any probate or letters of administration, knowing the will, testament, codicil, or testamentary writing on which such probate or letters of administration shall have been obtained to have been forged or altered, or knowing such probate or letters of administration to have been obtained by any false oath, affirmation or affidavit, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years."

The essence of this section appears to be that where property has been obtained not merely by false pretences, but by false pretences into which forgery or its equivalent enters, the offence shall be constituted a felony, and may involve much severer punishment than either the mere obtaining of money by false pretences or a mere forgery at common law.

I can not see anything in the nature of such a section which should make it necessary or desirable to restrict the application of the word "instrument" to writings of a formal character, and I think it is meant to include writings of every description, if false and known to be false by the person who makes use of them for the purpose indicated.

The severity of the possible punishment has been appealed to as a reason for restricting the application of the section to documents of a more formal character, or documents having in themselves some legal operation. The argument appears to me to have no weight. The section embraces cases involving forgeries which may be of a very heinous nature, such as forgeries of wills, or letters of administration. It always involves the commission of one crime by means of another. There is

no minimum of punishment, and the limits of discretion are not unreasonable. Theoretically a boy may be sent to penal servitude for five years for stealing an apple, and that though it be his first offence; and the limits of discretion in cases of many offences, whether triable at quarter sessions or at assizes only, are equally large.

No violence is done by this construction to the use of the word "instrument." In *Coogan's Case*, 1 Leu. 449; 2 East, P. C. c. 19, s. 43, p. 948, Butler, J., defined forgery at common law as the "making of a false instrument with intent to deceive." Blackstone, J., defines forgery as the "fraudulent making or alteration of a writing to the prejudice of another man's right." 4 Comm. 247. It is plain that in these definitions "instrument" and "writing" are synonymous. East, himself a writer of considerable authority, defines forgery in one passage as "a false making—a making *malo animo* of any written instrument for the purpose of fraud and deceit" (2 Pleas of the Crown, 852); and in another paragraph as "the counterfeiting of any writing with a fraudulent intent whereby another may be prejudiced." (*Ib.* 861). It is obvious that the writer in these passages treats "instruments" and "writings," as, for the present purpose, synonymous.

For these reasons I am clear that the conviction must be affirmed.

I think further that, even if the true construction of the word "instrument" required a more restricted meaning, the telegram in the present case would fall within it. It was a writing which, if accepted and acted upon, would establish a business relation and lead directly to business dealings with another person. It is true that the dealings were of such a nature that they led to no legal rights and could not be made the foundation of an action; but they were not forbidden by law, and in that sense and to that extent were legitimate. A postoffice telegram is issued by a public department in the course of business, and in the present case the telegram appears to me to have sufficient formality, both in its origin and in the use to which it was put, to deserve the name of an "instrument."

The only hesitation I have in saying so is lest it should appear to imply any lingering doubt in my own mind as to the correctness of the wide meaning I have given in the prin-

incipal part of my judgment to the word "instrument." I have no doubt or hesitation about the matter, and I notice the second point only because it was argued before us.

LORD RUSSELL OF KILLOWEN, C. J. I have only one observation to add to the judgments which have just been read. It is obvious that this case is not one of general importance, although it is, of course, of importance to this particular prisoner, because it is quite clear that the prisoner in what he did committed an act of forgery at common law; it is also clear that he committed a serious misdemeanour within the Telegraph Act, and it is probable that his conduct also amounted to an obtaining of money by false pretences. I do not desire to dissent from the result at which the majority of this court have arrived; but for my own part I share the doubts expressed by my brother, VAUGHAN WILLIAMS, in the judgment which he is about to read. MATHEW, J., authorizes me to state that he concurs in the decision of the majority of the court.

VAUGHAN WILLIAMS, J., read the following judgment: I concur in the opinion that the defendant, on the facts of this case, was guilty of counterfeiting a writing with intent to defraud, and therefore of forgery by the common law; but I do not think he was guilty of any statutory forgery, or that the telegram sent falls within the description of any of the written instruments the forgery of which is made felony by 24 and 25 Vict. c. 98; but I propose to make some observations on the question whether the defendant was guilty of an offense within s. 38 of that statute.

This question turns on the meaning, in s. 38 of 24 and 25 Vict. c. 98, of the words "any forged or altered instrument whatsoever." Do these words mean any writing whatever, or ought these words to be read subject to some, and what, limitation?

Two possible limitations occur to one: (a) that "instrument" must be read, not as including all writings, but only such writings as contain a contract, order or legal act of the writer; (b) that "instrument" in s. 38 means a writing the forgery of which is made a felonious forgery in the preceding sections.

The statute is a consolidating and amending Act relating to

indictable offences by forgery—*i. e.*, consolidating and amending the statute law relating to offences which are made forgery by statute. The greater part of the sections are culled from older statutes and put, as it were, on a statutory file. In construing such sections, I do not think one ought to let the meaning of a word in one section affect the construction in another section unless the sections are plainly connected. As to limiting the word "instrument" to contracts, orders, and legal acts, I do not think that the meaning to be attached to the word in the various sections of the act affords any guide to the meaning of the Act in s. 38. The meaning is sometimes the limited meaning, sometimes the wide meaning.

The meaning, however, in each case is to be derived from the collocation of the word with the provisions of the particular section. The use of the word "instrument" in this Act as a whole does not in any case seem to afford any assistance. I mention this because undue stress seems to me to be attached to the use of the word "instrument" in s. 42.

I think one must construe the words "any * * * instrument whatsoever" in s. 38 in reference to their collocation in s. 38, and not in reference to the use of the word "instrument" in other sections of the Act; but applying this guide of construction, I find nothing to lead me to the conclusion that "instrument" in that section is limited to writings containing a contract or legal act.

Secondly, as to limiting "any instrument * * * whatsoever" to writings, the forgery of which is made felony by the preceding sections, it will be observed that the first thirty-eight sections deal with the forgery of specific instruments, writings, or matters, or with matters connected with each such offence. Each group of sections is introduced with a heading, *e. g.*, "As to forging deeds, wills, bills of exchange," etc. Section 38 itself is headed, "As to demanding property upon forged instruments." The sections following s. 38 are headed, "As to other matters." Do the words, "by virtue of any forged or altered instrument whatsoever," in s. 38, mean any of the forged instruments dealt with in the preceding sections? Do they refer exclusively to the offences created by the act? I am inclined to think that this is the true construction, remembering that we are construing a penal statute.

The subject of the Act, up to s. 38, has been statutory forgery,

i. e., felonious forgery. This section creates an offence with reference to forged instruments. Does it not mean any instrument being one of those of which the forgery is made felony by this act? One reason for attributing this meaning is that the offence of demanding property upon forged instruments is made felony. This is quite reasonable if the forgery of the instrument itself, with intent to defraud, is made felony; but it seems unreasonable, in a case where the forgery, with intent to defraud, of the writing itself is not felony, to make the demanding property upon it felony. It seems unreasonable to make what may be the lesser offence felony, when what may be the graver offence is not felony. On the whole, I think that s. 38 is the supplement of the preceding sections, and that "instruments" must be limited to instruments (using the word in its widest sense), the subject of the preceding sections.

But although this is the inclination of my mind; I am not prepared to differ if the majority of the judges think otherwise. Conviction affirmed.

The Solicitor to the Post Office, solicitor for Crown.

Riley Blackburn, solicitor for prisoner.

NOTE.—*Indictment—Election of count.*—Where one count of an indictment charges forgery of a check therein set out, and the other count charges the uttering thereof, it is proper to refuse to compel the State to elect under which count it will proceed. *People v. Warner*, 104 Mich. 337.

Facts necessary to be stated.—An indictment which proceeded upon the theory that a certain certificate was of such a nature that, if genuine, it would create a demand against the county, did not allege facts sufficient to constitute forgery. *State v. Gee*, 28 Oregon, 100.

Same.—An indictment which alleges that defendant did "forge and alter" a certain note, without alleging that it was done "without authority," is insufficient. *Com. v. Bowman*, 96 Ky. 8.

Motion in arrest of judgment.—Where an indictment for forgery is insufficient as failing to allege that the forgery was done "without authority," a motion in arrest of judgment is properly sustained. *Com. v. Bowman*, 96 Ky. 8.

Dispensing with certain essentials by statute—Effect of.—Though the statute of Mississippi provides that when it shall be necessary to make an averment in an indictment as to any instrument, it shall be sufficient to describe such instrument by any name or designation by which it is usually known, or by the purport thereof, the description of an instrument in an indictment for forgery as "a certain instrument of writing, commonly called a 'deed,' purporting to be the act of one F., by which the interest in certain real property purported to be transferred and conveyed by said F. to said R.," is insufficient. 72 Miss. 110.

Not necessary to set out instrument in haec verba.—While in an indictment for forgery it is unnecessary to set forth a copy or *fac simile* of the instrument forged, yet if this is done, and there is a material variance between the copy so set out and the paper offered in evidence, such paper, on motion of the accused, should be excluded from the consideration of the jury. *State v. Flesham*, 40 W. Va. 726.

Same, when set out—Variance fatal.—When the alleged forged note is set out *in haec verba*, and in the body thereof are the words "with six per cent int. from date," and the note offered in evidence contains no such words, this is a variance, both in substance and legal effect, fatal to the introduction of such last mentioned note as evidence in support of the allegations of the indictment. *Id.*

Intent to defraud.—It is sufficient in an information for forgery to charge the intent to defraud in general terms. It is not necessary to state or prove an intent to defraud any particular person. *Morearty v. State*, 46 Neb. 652.

What subject of forgery.—An order to deliver to bearer a specific article of personal property is within the definition of section 145 of our Criminal Code in relation to forgery, as "any order or any warrant or request for * * * the delivery of goods and chattels of any kind." *Id.*

Same.—The order or request, upon which the charge in this case was founded, to let bearer have a designated article of personal property held to be the subject of forgery, though not addressed to any person by name; and where such an order is set forth by copy in an information charging its forgery, and it is apparent from its face or its terms that there was a possibility by its use to deprive some person of property rights, the information is sufficient without averment of any facts extrinsic to the instrument to extend or explain its terms.

Duplicity.—An indictment that defendant forged a check, and, with intent to defraud one C., offered him the check in payment for goods, does not charge two crimes, within Code Cr. Proc., §§ 278, 279, providing that an indictment must charge but one crime, except it may charge, in separate counts, the crime to have been committed in different ways. *People v. Altman*, 147 N. Y. 473.

Other forgeries.—In a prosecution for forgery of a check, it is reversible error to admit in evidence, to show defendant's intent in passing the check, other checks found on defendant's person, without proof that they were also forgeries. *Id.*

Receipt by one signing as agent.—When one, without authority, executes a receipt for money, purporting on its face to be executed by him as agent for the person whose name he signs, he is not guilty of forgery at common law, or under Pen. Code, § 470, which enumerates the kinds of writing which may be the subject of forgery. *People v. Bendit*, 111 Cal. 274.

ATKINS v. STATE.

(95 Tenn. 474.)

GAMING: *Accessory—Operating gaming device for another.*

1. There are no accessories to misdemeanors, but all connected with the offense are principals.
2. One who operates for another, at a fixed salary, a device known as a "six wheel," whereby money is won or lost, though he has no interest in the affair further than his salary, is guilty of a misdemeanor under Mill & V. Code, § 5688, making it a misdemeanor to play at any game of hazard for money, and under *Id.* § 5689, making one guilty of the same offense who aids or assists in keeping or exhibiting any gaming device.

Appeal in error from the Criminal Court, Knox County; T. A. R. Nelson, Judge.

Martin Atkins was convicted of unlawful gaming, and appeals. Affirmed.

Horace Foster, for appellant.

Atty. Gen. Pickle, for State.

CALDWELL, J. Martin Atkins was presented, tried and convicted in the Criminal Court of Knox County for unlawful gaming. The presiding judge fined him \$2.50, and he appealed in error. On the trial below it was unmistakably shown that the plaintiff in error had been engaged for some time in the operation of a gaming device, known as a "six wheel." Testifying in his own behalf, he said: "I was working for T. M. Smart. He gave me \$2 a day to run his wheel for him. He had a license to run a six wheel. His was a six wheel. * * * Smart made his living by running this wheel. The numbers were from 1 to 6. If you put a dollar down on the 2, and if it stopped on that number you would get \$4.00; if not, the man that run the wheel would get the dollar. I was only employed by the day, and had no interest in the business." These facts make a clear case of guilt on the part of the plaintiff in error. That the wheel was a gambling contrivance, and those participating in the games, thereon were guilty of unlawful gaming, is beyond question. The license, which Smart is said to have had, was not produced; and, if it had

been, it would have afforded no protection to any one, because there is no law authorizing the grant of such license, and unauthorized license is the same as no license at all. Smart, the owner of "the business," and his partners were undoubtedly guilty of unlawful gaming every time the wheel was operated for money or other things of value; and the plaintiff in error, who operated it, was as certainly guilty of the same offense in each instance, though he "had no interest in the business" as owner, and was only employed by the day at fixed wages. The relations of principal and agent, employer and employe, are not recognized in the criminal law. By that law every man must stand for himself. No man can authorize another to do what he may not lawfully do himself. If the attempt to confer such authority be made, and the unlawful act be done, both are guilty. In felonies, all unlawful participants are either principals or accessories; in misdemeanors they are all principals, and equally guilty. *State v. Smith*, 2 Yerg. 272; *Curlin v. State*, 4 Yerg. 144; *State v. Caswell*, 2 Humph. 400; 1 Bish. Cr. Law, §§ 594, 627.

"If any person play at any game of hazard or address for money or other valuable thing, or make any bet or wager for money or other valuable thing, he is guilty of a misdemeanor." Mill. & V. Code, § 5688. And again: "If any person encourage or promote, aid or assist the playing of any game, or the making of any bet or wager, for money or other valuable thing, or keep or exhibit any gaming table or device for gaming, he is also guilty of a misdemeanor." *Id.* 5689. The plaintiff in error is guilty under both of these provisions. By standing for and representing one side of each game upon the wheel he became guilty under the former provision, and by operating the wheel he became guilty in each instance under the latter provision. A person who, without betting himself, plays cards with others whom he knows to be betting something of value, is guilty of encouraging and promoting the offense of gaming." *Howlett v. State*, 5 Yerg. 145. In that case Judge Peck, speaking for this court, said: "He who plays is self-tempted into the debauch, and if innocent of the betting, it is still a crime if countenance be given to such as may." 5 Yerg. 152. In *Smith v. State*, 5 Humph, 164, it was decided that Smith, who engaged in "pitching dollars," without betting himself, but with knowledge that others were

betting on the game, was indictable and punishable for gaming. The court in the latter case, after approving the principle announced in Howlett's case, *supra*, said: "If a party plays at a game upon which he knows others are betting, he becomes thereby a guilty participator in the gaming, although he may not bet himself." *Smith v. State* 5 Humph. 165. See also *State v. Keith*, 3 Leg. Rep. 228; *McGowan v. State*, 9 Yerg. 185, and *Fugate v. State*, 2 Humph. 398. In the case of *Eubanks v. State*, 3 Heisk. 488, a mere clerk who sold prize candy packages for his employer was held to be guilty of gaming; and in Caswell's case, previously cited herein, the court, referring to the alleged relation of employer and employe in unlawful tipping, said: "In minor offenses, aiders and abettors are principals. Therefore, if one procure the spirits for the purpose of retailing, and hire another to attend to the bar as his servant, and he retails, both are guilty." 2 Humph. 400. To same effect are numerous cases mentioned in 1 Bish. Cr. Law, § 627.

It can be of no avail to the plaintiff in error, upon the question of guilt, that he thought he had a lawful right to operate the wheel for Smart. Ignorance of law is no excuse for its violation. There is no doubt, however, that some allowance was made for his professed good faith when the court came to consider the measure of punishment, and fined him only \$2.50. Affirmed.

NOTE.—*Rooms used by club*—Mr. Justice Knowlton in *Com. v. Blankinship*, 165 Mass. 40, holds that rooms used for gambling by a club and such other persons as the members invite is a common gaming house. "Under the English statute," he says, "which is not identical with ours, it is held that a building may be a common gaming house, although resorted to only by members of a club for whose use the place is maintained. *Jenks v. Turpin*, 13 Q. B. Div. 505. Gaming houses in this country and in England are seldom open to all the public. Usually only those persons are admitted who are supposed to be willing to have the law violated in this way. Often strong doors and double locks are used to keep out, not only officers of the law, but all others who are not known to the proprietor, or vouched for by his friends. The word "common," as applied to a gaming house, does not necessarily mean that it is open to all the public.

Instruction.—*Judge becoming unusually emphatic*.—On trial of an information under statute of Arkansas making it a penal offense to be directly or indirectly interested in keeping or exhibiting any gambling device, a charge that "the law does not tolerate any subterfuge in violation of its penal laws, and, * * * if you believe * * * that the defendant employed any person to watch a machine of the description charged,

* * * you will be authorized to convict," did not violate Const. art. 7, § 23, prohibiting judges from charging on matters of fact; it being conceded that defendant employed a person to look after the machine "to keep any person from breaking it:" that it was a gambling device, and in a public place. *Jeffries v. State*, 61 Ark. 308.

It is not only undignified, but unjust in a judge to become excited or to throw the weight of his influence on either side of a case.

Indictment—Apparatus for registering wagers and selling pools.—In a prosecution for violation of the statute of Connecticut, an indictment charging defendant with keeping a place with apparatus for registering wagers, and also for the purpose of buying and selling pools, as the keeping of a place for either of these purposes is forbidden by the statute, does not charge two offenses. *State v. Folk*, 66 Conn.250.

Same.—An indictment under statute for being engaged in the business of transmitting money out of the State to be bet on horse races is insufficient, unless it charges that defendant had knowledge of the unlawful purpose for which the money was transmitted out of the State. *Id.*

Same.—Under an indictment for keeping a place for transmitting money to be bet on races out of the State, it is no defense that defendant was concerned in it as a corporator or agent of a corporation authorized to do such business in another State. *Id.*

STATE V. PETERSON ET AL.

(61 Minn. 73.)

GRAND JURY: *Discharge—Ordering new venire—Jury list—Dismissing indictment—Effect of.*

1. The district court has the power, under the statute, to discharge the grand jury impaneled at a regular general term of the district court, adjourn the term to a future day, and order a new venire of grand jurors to be drawn and summoned for such adjourned term.
2. Such new venire may be drawn from the regular jury list selected by the county commissioners and certified and filed with the clerk of the court.
3. The statute requires such commissioners to make out separate lists of grand and petit jurors. *Held*, two separate lists following one heading, and certified to by only one certificate, comply with the statute. *Held*, the certificate in this case is sufficient.
4. The number of names on the grand jury list was reduced to forty-nine by the drawing of the grand jury for the regular term. The county commissioners did not meet after such drawing and before the drawing of the grand jurors for the adjourned term. *Held*, a grand jury for such adjourned term might legally be drawn from said forty-nine names.
5. The dismissal of an indictment on the motion of the county attorney,

after the same has been attacked by demurrer, is not equivalent to a decision of the court sustaining the demurrer, so as to prevent the case from being resubmitted to the same or another grand jury without the order of the court.

6. On the dismissal of an indictment on the motion of the county attorney, a second indictment may be found by the same grand jury for the same offense, on the evidence already received, on which the former indictment was found, and it is not necessary that any new or additional evidence be received. *Held*, the motion to set aside the second indictment was correctly denied.

Case certified from District Court, Polk County; Frank Ives, Judge.

Gustave Peterson and John J. Ostby were indicted for selling intoxicating liquors to a minor. A motion to set aside the indictment was denied, and the case was certified to the supreme court. Affirmed.

II. W. Childs, Attorney-General; *Geo. B. Edgerton*, Assistant Attorney-General; and *L. E. Gossman*, County Attorney, for the State.

II. Steenerson, for defendants.

CANTY, J. The defendants were indicted at an adjourned term of the district court for the crime of selling on January 14, 1895, intoxicating liquor to a minor. They moved to set aside the indictment on the grounds hereinafter stated, the motion was denied by the court, and the judge thereof certifies to this court the question whether it was error to deny said motion. The regular general term of the district court of Polk county commenced on the 3d of December, 1894. On December 10th the grand jury appeared before the court and reported that they had finished their business.

Thereupon the judge stated to them that they had failed to do their duty; "that he knew there was sufficient evidence before them to find indictments in cases where they had failed to do so;" and that he felt it his duty to order a special venire for twenty-three grand jurors to issue immediately; and therefore discharged them. The court then ordered a special venire for twenty-three grand jurors, returnable December 17th, to issue, but later in the day modified the order so as to make the venire returnable January 15, 1895. The venire was issued and placed in the hands of the sheriff, but was afterward

recalled and the order revoked. On December 22, 1894, the following order was made:

"STATE OF MINNESOTA, } District Court.
POLK COUNTY. }

It appearing to me that there is a necessity for an adjourned term of this court to be held at as early a day in January, 1895, as practicable, for the trial of civil and criminal cases; and it further appearing that a grand jury is necessary at said adjourned term to inquire into the crimes, if any, committed in said county—therefore it is ordered that the December, 1894, term of this court be, and the same is, adjourned to, and will be held at the court house in the city of Crookston, in the said county, on Tuesday, the 15th day of January, 1895, at ten o'clock A. M. of that day, at which time the petit jury, and each and every member thereof, unless duly excused, will appear and be in attendance on said term. And it is further ordered that Nils Muus, clerk of this court, be and hereby is instructed forthwith to draw a grand jury for said adjourned term in the manner prescribed by law for drawing jurors, and on or before the first day of January, 1895, to issue his venire to the sheriff of said county, directing and commanding him to duly summon such jury to be and appear before this court, as grand jurors at such adjourned term, at the time and place before named.

Dated this 22d day of December, 1894.

By the Court, FRANK IVES, Judge."

Pursuant to this order, on the same day, the clerk, in the presence of the sheriff and a justice of the peace, drew from the jury box the names of twenty-three grand jurors, in the manner prescribed by section 6, c. 107, Gen. St. 1878 (section 7175, Gen. St. 1894), and on the same day the clerk issued to the sheriff a venire commanding him to summon the persons so drawn to appear before the court at said adjourned term. Said jurors were summoned and appeared at said adjourned term, were sworn and charged as a grand jury, and returned the indictment here in question.

1. It is urged by defendants that the court had no power to order this grand jury for this adjourned term. We are of the opinion that the court had such power. Section 15, c. 64, Gen. St. 1878 (section 4850, Gen. St. 1894), provides for the holding of adjourned terms, and provides that the judge "may

direct grand and petit jurors to be drawn and summoned for any adjourned or special term in the manner prescribed by law."

2. It is further urged that, if the court had power to order the summoning of such special grand jury, it should have been summoned by the sheriff from the body of the county in the manner prescribed by section 17 of said chapter 64, Gen. St. 1878 (section 4852, Gen. St. 1894). We are not of that opinion. Section 17, c. 64, Gen. St. 1878 (section 4852, Gen. St. 1894), applies where "at any term of *any* district court, there is a deficiency of jurors," or "an entire absence of jurors of the regular panel, whether from an omission to draw or to summon such jurors or because of a challenge to the panel or from any other cause." In these cases the court may order a special venire to issue to the sheriff of the county, commanding him to "summon from the county at large * * * competent persons to serve as jurors." Under this section jurors are not "drawn" at all, but simply "summoned" by the sheriff from the county at large. But under the provisions of section 15, c. 64, Gen. St. 1878 (section 4850, Gen. St. 1894), the court may direct grand jurors "to be drawn" and summoned for an adjourned term, which was done in this case.

3. It is further urged that no legal list of grand jurors had ever been prepared or certified to as required by section 107, c. 8, Gen. St. 1878 (section 673, Gen. St. 1894), which requires the county commissioners to "make out separate lists" of grand and petit jurors, "which lists shall be certified and signed by the chairman of the board, attested by the clerk and shall be forthwith delivered to the clerk of the district court." At the head of the list in question it is stated that: "The names were selected by the board of county commissioners of Polk county, at the adjourned annual meeting held on the 20th day of January, 1894, to serve as grand and petit jurors, respectively, for the ensuing year. Grand Jurors: [Then follows a list of the names of grand jurors, and the place and election district in which each resides.] Petit Jurors: [Then follows a list of the names of petit jurors, and the place and election district in which each resides.] Certified as correct: C. U. Webster, County Auditor, by M. Cornelius, Deputy. [Seal of County Auditor.] A. C. Reinhart, Chairman of County Board." It is urged that "separate lists" of grand

and petit jurors were not made out as required by the statute. Although the list of grand jurors and the list of petit jurors are both included under one head, and covered by only one certificate, they are certainly separate lists. The statute prescribes no particular form of certificate, and, though somewhat informal, we are of the opinion that the certificate is sufficient. *Kipp v. Dawson*, 59 Minn. 82, and *State v. Brill*, 58 Minn. 152.

4. There is nothing in the point that there were but forty-nine names on the grand jury list when this special grand jury was drawn, the number on said list having been reduced to forty-nine by the drawing of the grand jury for the regular December term, and the county commissioners not having met after that drawing and before the drawing of such special grand jury for the adjourned term.

5. A former indictment for the same offense was found against the defendants at said adjourned term by the same grand jury. The defendants demurred to that indictment, and on the day set for the argument of the demurrer, but before the argument the indictment was dismissed on the motion of the county attorney, and the case was resubmitted to the grand jury, who found the indictment here in question. Sections 7-9 of chapter 111, Gen. St. 1878 (section 7297-7299, Gen. St. 1894), provide that if such a demurrer is sustained the defendant shall be discharged, unless the court directs the case to be resubmitted to the same or another grand jury. It is urged that such dismissal was equivalent to sustaining the demurrer, and that it does not appear that the court ordered the case resubmitted. It is sufficient answer to this to say that it does not appear that the court did so order, and error will not be presumed. But we are of the opinion that this provision of the statute can not be extended in this manner. The demurrer was not sustained, and such a dismissal is not equivalent to an order sustaining the demurrer.

6. It is claimed that the indictment here in question was returned on the same evidence on which the former indictment was found; that no other evidence was given before the grand jury—and it is urged that the grand jury can not act a second time on the same evidence, and return a second indictment after the first is dismissed. The point is not well taken. The grand jury can, under such circumstances, return a second indictment on the same evidence. 1 Bish. Cr. Proc. § 870.

This disposes of all the questions raised. We are of the opinion that the court below did not err in denying the motion to set aside the indictment, and the cause is remanded for further proceedings.

NOTE.—*Identity of case can not be disproved by grand juror.*—Testimony of members of the grand jury that found the indictment is inadmissible to show the character of the evidence taken before them for the purpose of disproving the identity of the case on trial with that on which the grand jury acted. *Newman v. State*, 72 Miss. 124.

Same.—Arguments between members of the jury, and their deductions from the evidence, can not be shown by affidavit to impeach the verdict. *State v. Beste*, 91 Iowa, 565.

Qualification of grand juror—Property tax.—A plea in abatement which alleged merely that two of the grand jurors who returned the indictment, and who were drawn from a certain city, had not within a year next preceding their service, paid any tax on their property in such city, was bad, since one need not have paid a tax on one's real estate within the year next preceding the time of voting in order to be able to vote on a tax proposition, and it will be presumed such jurors had the qualifications required by Const. art. 2, § 1. *State v. Rife*, 18 R. I. 473.

STATE v. HULL.

(18 R. I., 207.)

HOUSE OF ILL. FAME: *Evidence of defendant's reputation—Remarks of counsel—Failure of defendant to testify.*

1. On trial of an indictment charging a woman with keeping a house of ill fame, where no evidence for defendant is offered, it is error to permit the State to introduce evidence as to her reputation for chastity.
2. On such trial the attorney-general stated to the jury that it was a serious matter that she did not answer the questions that were asked about it; and that "she does not dare to put in her testimony, for the testimony for the defense would show you, more plainly than the testimony that has gone in on the side of the State, as to this" being a house of prostitution. *Held*, that, though the use of this language is disapproved, it is insufficient ground for a new trial, where no objection was made at the time, and no request was made to charge the jury not to consider it.

Clara Hull was convicted of keeping a house of ill fame, and petitions for a new trial. Petition granted.

Robert W. Burbank, Attorney-General, for the State.

Charles H. Page and *Franklin P. Owen*, for defendant.

TILLINGHAST, J. The defendant, who was found guilty in the court of common pleas, at the September term, 1891, of keeping and maintaining a common nuisance, to wit, a house of ill fame, in the city of Providence, now petitions this court to grant her a new trial on the grounds: First, that the court below erred in admitting testimony relating to the reputation of the defendant; and, second, that certain remarks made to the jury by the attorney-general, in his argument, were improper and prejudicial to the rights of the defendant.

The attorney-general was permitted by the court, against the objection of the defendant's counsel, to ask Thomas D. Tyler, a witness called in behalf of the State, the following question, namely: "What is the reputation of Clara Hull?" Said Clara Hull was the defendant in said case. George R. Waterman, another witness called in behalf of the State, was asked the following question, viz.: "Do you know what is Clara Hull's reputation for chastity?" Several other witnesses called by the attorney-general were each asked the question, against the defendant's objection: "What is the reputation of Clara Hull?" No testimony was offered at the trial in behalf of the defendant.

The attorney-general contends that, under an indictment for keeping and maintaining a house of ill fame, evidence of the character of the defendant for chastity, as well as that of the inmates of such house, and of those who frequent the same, is admissible. We do not assent to this proposition. It is a fundamental principle of the criminal law that the character of a defendant can not be impeached or attacked by the State unless he puts his character in issue, either by becoming a witness in his own behalf, or by offering evidence in support of his character. *State v. Waldron*, 16 R. I., 191, 195; *State v. Ellwood*, 17 R. I. 763; *State v. Creson*, 38 Mo. 372; *State v. Lapage*, 57 N. H. 245, 290; *Young v. Com.*, 6 Bush, 312, 316; *Reg. v. Rowton*, 10 Cox Crim. Cas. 25, 30; Greenl. Ev. [13th Ed.] §§ 25, 26, and cases cited), excepting that, in those cases where the defendant's character is put in issue by the prosecution, then the prosecutor may examine as to particular facts; for it is impossible, without it, to prove the charge, (1 Chit. Crim. Law. 574, 575; *People v. White*, 14 Wend. 111, 114; *Whart. Crim. Ev.* [8th Ed.] § 64, and cases cited in note 6.) See, also, *Knight v. State*, 70 Ind. 375, 380; *Allen v. State*, 15 Tex. App. 320, 323; *Mor-*

erson v. State, 76 Ind. 335. The case before us is not one which comes within the exception just mentioned, as would that of one charged with being a "notorious thief" (*World v. State*, 50 Md. 49), or of being "guilty of notorious adultery," under a statute making such an offense indictable (*People v. Gates*, 46 Cal. 52; Whart. Crim. Law, § 1747). The defendant is charged with keeping a house of ill fame, under the provisions of Pub. St. R. I. c. 80, § 1, and we fail to see that her individual character is thereby put in issue any more than it would have been had she been indicted under the same section for keeping and maintaining a grog shop or tippling shop. And, under an indictment for the last named offense, we have never known of evidence being admitted as to the character of the defendant, unless he voluntarily put his character in issue. That the "ill fame" or bad reputation of the house may be put in evidence in a case like the one before us, as may also the bad reputation of the inmates, and of those who frequent the place, there seems to be no doubt. *Com. v. Gannett*, 1 Allen 7; *Com. v. Kimball*, 7 Gray, 328, 330; *State v. Boardman*, 64 Me. 523; *State v. Lyon*, 39 Iowa, 379; *McCain v. State*, 57 Ga. 390; *Beard v. State*, 71 Md. 275; *State v. Towler*, 13 R. I. 661, 665; *Com. v. Clark*, 145 Mass. 251, 255, Whart. Crim. Ev. § 261, and cases cited. But to go beyond this, and admit evidence of the character of the person on trial for the keeping of such a house, is, it seems to us, clearly violative of the defendant's rights. In *State v. Hand*, 7 Iowa, 411, which was an indictment for keeping a house of ill fame resorted to for the purpose of prostitution and lewdness, the court in which the case was originally tried instructed the jury "that it was not necessary for the State to prove particular facts of lewdness or prostitution. Common reputation as to the character of the defendant, and of the house which he kept, is admissible to prove the crime." The defendant was found guilty, and, in reversing the judgment, the supreme court said: "The indictment is against the keeper, and not against the house as a nuisance. To convict, the house must be shown to be a house of ill fame, resorted to for the purpose named, and that defendant was the keeper of it. Particular acts of lewdness or prostitution need not be proved. The counsel for the defendant admit this much, and also that the character of the house may be fixed or shown by reputation or rumor.

The objection is that the defendant can not be made liable, as the keeper of such a house, by evidence of common reputation as to his character, and this objection we believe to be well taken. The bad character of the prisoner is entirely immaterial, in the first instance, in determining whether he was the keeper of the house; and that he was the keeper must be shown, in order to convict. If the charge was against the house, then its fame—ill fame—might be shown by proving, among other things, the character of the persons—the defendant among others—resorting there from time to time. * * *

Common reputation as to his character, however, is quite a different thing, and is not admissible to prove the crime here charged." In *Gamel v. State*, 21 Tex. App. 357, the prosecution was allowed to prove, over objection, the defendant's general reputation for want of chastity. In reversing the judgment in that case the court said: "The indictment is for keeping a disorderly house, not the keeper's character for being a common prostitute, or having a reputation for want of chastity. Such evidence was not admissible, because it did not tend to prove the issue to be tried." See also *Allen v. State*, 15 Tex. App. 320. The attorney-general has referred us to several cases in which it is held that common reputation as to the character of the defendant is admissible. It is so held in *State v. McDowell*, Dud. (S. C.) 346; but the court, while stating that the admissibility of such evidence "can be fully shown," cites no cases in support thereof. In *Sparks v. State*, 59 Ala. 82, 87, the court says that "accompanied by evidence (which appears to have been given) that the defendant held herself out as having control over, managing, and keeping the house, and that it was frequented by persons of dissolute habits, and that the reputation of its inmates for chastity was bad, it was permissible to show that the character of the defendant for chastity was bad." The same doctrine seems to be held in *Betts v. State*, 93 Ind. 375, although not necessary to the decision. We think, however, that the better authorities, as well as the better reason, are opposed to the doctrine of these cases; and we are not, therefore, disposed to follow them. The case of *People v. Saunders*, 29 Mich. 269, cited by the attorney-general, simply holds that under section 7702 of the Compiled Laws of Michigan, which makes the letting of a dwelling house, "knowing that the lessee intends to use it as

a place of resort for the purpose of prostitution and lewdness," a crime, the prosecutor may prove that the lessee is a woman of ill repute, and had previously kept houses of ill repute. But it does not hold that the character of the defendant can be attacked. We therefore decide that it was error to permit the State to offer evidence relating to the defendant's character.

The language used by the attorney-general in his argument to the jury, of which the defendant complains, was as follows: "Gentlemen, of course it is not proper for me to remark upon the failure of the respondent to testify in this case; but if she stands here, as a defendant, to meet these charges, it is her duty to meet not by her own testimony—it is her privilege to testify or not—but she can put on other witnesses to show that her house is the moral place, the pure place, that she would have you believe. It is a serious matter if she does not answer the questions that are asked about it. She could prove that it is all right by others; that her house is a pure place.

* * * She does not dare to put in her testimony; for the testimony for the defense would show you, more plainly than the testimony that has gone in on the side of the State, as to this house at No. 20 Walker street being a house of prostitution." While we do not think that the use of this language furnishes sufficient ground for a new trial, as the attorney-general expressly stated that it was not proper for him to remark upon the failure of the defendant to testify, yet, as the matter has been brought up on the record, and formally urged as a ground for new trial, we can do no less than express our disapprobation of this line of argument on the part of the State. It was the defendant's privilege, as well as right, not only to remain silent herself, but also not to offer any testimony in her defense, but to rely upon the presumption of innocence which obtained in her favor, and the insufficiency of the evidence produced by the State to convict her. In other words, the State was bound to prove her guilty, without any assistance, either active or passive, on her part. To assume in argument, therefore, that testimony for the defense, if offered, would show, more plainly than that put in by the State, that the defendant was guilty, was certainly going somewhat beyond the limit of legitimate inference. But, in order to constitute said objectionable remarks a ground for new trial in any event, it was the defendant's duty to have objected

thereto at the time, and to have requested the court to charge the jury not to consider them, which, so far as the record shows, she failed to do. *Young v. State*, 19 Tex. App. 536; *Comer v. State*, 25 Tex. Cr. App. —; 16 Amer. & Eng. Enc. Law, 527, and cases in note 1, p. 528. For the error first above specified, we grant the defendant a new trial. Petition granted.

ALLISON V. UNITED STATES.

(160 U. S. 203.)

MURDER: *Witness—Rights and privileges of accused when offered in his own behalf—Improper remarks of trial judge—Self-defense.*

1. When a person indicted for the commission of murder, offers himself at the trial as a witness on his own behalf, under the provisions of the act of March 16, 1878, c. 37, 20 Stat. 30, the policy of the enactment should not be defeated by hostile intimations of the trial judge.
2. The defendant in this case having offered himself as a witness in his own behalf, and having testified to circumstances which tended to show that the killing was done in self-defense, the court charged the jury: "You must have something more tangible, more real, more certain, than that which is a simple declaration of the party who slays, made in your presence by him as a witness, when he is confronted with a charge of murder. All men would say that." *Held*, that this was reversible error.
3. Other statements made by the court to the jury are held to seriously trench on that untrammelled determination of the facts by a jury to which parties accused of the commission of crime are entitled.
4. What is, or what is not, an overt demonstration of violence sufficient to justify a resistance which ends in the death of the party making the demonstration varies with the circumstances; and it is for the jury, and not for the judge, passing upon the weight and effect of the evidence, to determine whether the circumstances justified instant action, because of reasonable apprehension of danger.
5. Where the charge of the trial judge takes the form of animated argument, the liability is great that the propositions of law may become interrupted by digression, and be so intermingled with references springing from forensic ardor, that the jury will be left without proper instructions, their province of dealing with the facts invaded, and errors intervene.

Error to the Circuit Court of the United States for the Western District of Arkansas.

John Allison, some twenty years old, was indicted for the murder of his father, William Allison, on the fifth day of January, 1895, at the Cherokee Nation, in the Indian country, in the Western District of Arkansas, found guilty by a jury, under the instructions of the court, and sentenced to be hanged; whereupon he sued out this writ of error.

The evidence tended to show that the Allisons resided, up to the year 1893, in the State of Washington; that the parents had been divorced; that the father had repeatedly threatened the lives of the members of his family, and for an assault upon one of his sons and his son-in-law, by shooting at them with a pistol, had been sent to the penitentiary for a year; and that thereupon the family left the State of Washington and came to the Indian country. In about a year the father appeared, first at Hot Springs, Arkansas, where one daughter had located, and then in the neighborhood of the other members of the family, in the Indian country, and at once began threatening the lives of the entire family, and particularly that of his son John. A great variety of vindictive threats by the deceased in Washington, at Hot Springs, and in the Indian country was testified to.

Evidence was also adduced that on one occasion he came to the house where the mother and her children were living and demanded to see the children, who (except John and one whom he had seen) were not at home, and he then wished to see their mother, who objected to meeting him; that he persisted; whereupon his son John, who had a gun in his hand, told him he must leave, and the father dared John to come out, and he would fight him outside; but John answered that he did not want any trouble with him—only wanted him to stay away from there; and the deceased replied: "God damn you;" that he subsequently told his son-in-law to tell John Allison "that he would blow his God damned brains out the first time he seen him; told him to tell him he would kill his mother and the entire family;" that the day after this occurrence John Allison and his mother made an affidavit to get a peace warrant for William Allison, and on that occasion John told the prosecuting attorney that the old man threatened his life, and he thought he was in danger, and asked him if he killed the old man what would be done with him; and he replied that, "if the old man came to his house and raised a racket and

tried to carry out his threats, that he told me he had made on him, I told him he would be justified in doing it," but that he must not go "hunting the old man up and trying to kill him;" and that John said, "I will not bother him; if he will let me alone, I will let him alone;" and that this was five or six days before the killing.

The evidence further tended to show that the deceased had been in the habit of carrying a pistol; that he stated that he had one; that on New Year's day he threatened one of the witnesses with that weapon, and another witness testified to catching a glimpse of it once when he put his hand around to his hip pocket; but that he had no pistol on him when he was killed. The deceased was staying at the house of one Farris, and a witness testified in rebuttal to conversing with John when he was "warming" on one occasion at the barn—presumably Farris' barn—and asking him why he did not go up to the house, and he said he did not want to go up there; that he was afraid he and his father would have some trouble; that he was afraid his father would hurt him; and that he was going to kill him just as quick as he caught him away from the house.

As to the circumstances immediately surrounding the homicide, the defendant testified that he and a man by the name of Rucker had killed a deer near Rucker's the day before, and that he had promised Rucker to come back the next day to hunt for others, and was riding by Farris' place, which was on the way to Rucker's, with his gun in his hand, on that errand, on the morning of January 5th, when he saw a person whom he took to be his brother Jasper up at Farris' house; that this person turned out to be Farris with his brother's coat on; but he stopped at the stable thinking that his brother would come down that way, as he had learned from his sister that his brother was to be at the place at that time for the purpose of removing some household goods; that he did not go up to the house because he did not want to meet his father; that shortly after he arrived at the barn his father came through the gate, and he stepped to one side to let him go into the barn if he wished to, but deceased did not go towards the door, came straight towards him, and when he got a few feet from him said: "You have got it, have you?" and threw his hand back as if he was going to get a pistol; "made a dem-

onstration that way," and that this demonstration, and the threats he had made, led defendant to believe that he was going to draw a pistol, and he fired; that he fired three shots, but none after the deceased fell. Defendant was corroborated by Rucker and others in many particulars, but contradicted by the government's witnesses in respect of firing after his father was down, they testifying that he fell at the first shot.

Mr. William M. Cravens, for plaintiff in error.

Mr. Assistant Attorney General Whitney, for defendants in error.

Mr. Chief Justice FULLER, after stating the case, delivered the opinion of the court.

It was claimed on behalf of the defendant, that the homicide was excusable because committed in self-defense, in that his life having been repeatedly threatened by deceased, when he saw him on this occasion moving his hand as if to take a pistol from his hip pocket, he believed, and as a prudent man might reasonably have believed, at that time and under those circumstances, that he was in imminent and deadly peril which could only be averted by the course he pursued; or that at the most, he could only be found guilty of manslaughter for acting under an unreasonable access of fear, but without malice.

The threats were conceded, and there was evidence that the deceased was in the habit of carrying a pistol; that he had recently carried one in his hip pocket; that he had sent word to defendant that he should kill him on sight; that defendant had started on a hunting expedition that morning, and that his stopping at Farris' place was accidental, but the facts that he at first stepped away from his father, and that the latter advanced on him and made the threatening demonstration as if to draw a pistol, which the defendant knew he was accustomed to have upon him, apparently depended on defendant's testimony alone. The question for the jury to determine, from all the facts and circumstances adduced in evidence, was the reasonableness of the belief, or fear, of the existence of such peril of death or great bodily harm as would excuse the killing. And it was for the jury to test the credibility of the defendant as a witness, giving his testimony such weight under

all the circumstances as they thought it entitled to, as in the instance of other witnesses, uninfluenced by instructions which might operate to strip him of the competency accorded by the law.

We repeat what was said by Mr. Justice Shiras, speaking for the court, in *Hicks v. United States*, 150 U. S. 442, 452:

"It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices, and, perhaps, a judge can not be considered as going out of his province in giving similar caution as to the testimony of the accused person. Still, it must be remembered, that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury properly enough give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is, that 'the person charged shall at his own request, and not otherwise, be a competent witness.' The policy of this enactment should not be defeated by hostile intimations of the trial judge, whose duty it is to give reasonable effect and force to the law." Similar views have been expressed in many cases in the state courts.

In *Commonwealth v. Wright*, 107 Mass. 403, it was held that there was no presumption either way as to the truthfulness of a defendant's testimony in a criminal case, and that his testimony is to be considered and weighed by the jury, taking all the circumstances of the case and all the other evidence into consideration, and giving such weight to the testimony as in their judgment it ought to have.

"It can not," observed Scholfield, J., in *Chambers v. The People*, 105 Illinois, 409, "be true that the evidence given by the defendant charged with crime is not to be treated the same as the evidence of other witnesses. It could not even be true, as a universal proposition, that, as matter of law, it is not to have the same effect as the evidence of other witnesses. Many times it certainly can not have that effect, but there are times when it can and should, and of this the jury are made the judges."

And see *Greer v. State*, 53 Ind. 420; *Veatch v. State*, 56 Ind. 584; *Buckley v. State*, 62 Miss. 705; *State v. Johnson*, 16 Nev. 36.

Among the errors assigned in the present case was one to so much of the charge as is given below in italics, in respect of which a sufficient exception was preserved. The trial judge said:

"You have heard in argument here, incidentally dropped, no doubt, because these things have been repeated here so often in this court, that every child knows what the law of self-defense is, that if a man thinks he has a right to slay he can slay. That is a great misapprehension of what this proposition of the law is and what it means. If that was the case how many men, when they are arraigned for the killing of a human being, would not assert that they thought they had a right to kill? What a perversion of this protection agency called the law of the land this would be! No, that is not the law. It must be shown by the evidence that the party who was slain, was at the time doing something that would satisfy a reasonable man, situated as was the defendant, that the deceased, William Allison, then and there was about to do that which would destroy the life of the defendant, and that he could not prevent it except by doing as he did do. *The question as to whether that is the state of case or not, is a question that is to be finally passed upon by the juries of the country, and by you in this case, and you must have something tangible, more real, more certain, than that which is a simple declaration of the party who slays, made in your presence by him as a witness, when he is confronted with a charge of murder. All men would say that. No man created would say otherwise when confronted by such circumstances, and the juries, as a matter of fact, would have nothing to do but to record the finding which was willed or established by the declaration of the party who did the killing.*"

In this there was error. While the trial judge may not have intended to be understood that the defendant could not prove his defense by his own testimony, and had it in his mind simply to warn the jury that they should not rely on the defendant's opinion that his conduct was justifiable, but on the facts, or what reasonably appeared to him to be such, we think these remarks had a much wider scope, and must have been so understood by the jury. The "state of case" put to the jury was

whether William Allison was at the time doing something that would satisfy a reasonable man, situated as defendant was, that he was about to do what would destroy defendant's life, and which defendant could not prevent except by doing as he did; and the question as to the existence of that state of case was required by the instruction to be passed on by the jury on something more than defendant's declaration, which, it was stated, would certainly be made by any man created when confronted with a charge of murder.

Defendant had testified to the facts upon which he based his belief that he was in peril, and it was for the jury to say from the evidence whether the facts as he stated them actually or apparently existed, and whether the homicide could, therefore, be excused either wholly or in part. And if the jury regarded the remarks of the court as applicable generally to defendant's testimony, then defendant was practically deprived of its benefit, and the statute enabling him to testify was rendered unavailing. In our opinion the liability of the jury to thus understand these observations was so great that their utterance constitutes reversible error.

Nor was this error obviated by what, some time after—the intervening portion of the charge occupies six closely printed pages—was said by the trial judge, as follows: “The defendant has gone upon the stand and he has made his statement. See if it is in harmony with the statements of witnesses you find to be reliable. If they are not, they stand before you as contradicted. If they are, they stand before you as strengthened as you may attach credit to the corroborating facts. In passing upon his evidence you are necessarily to consider his interest in the result of this trial, in the result of this case. He is related to the case more intimately than anybody else, and you are to apply the principle of the law that is laid down everywhere in all civilized countries, commanding you to look at a man's statements in the light of the interest that he has in the case. There is no odor of sanctity thrown around the statements of the defendant as a witness, as is sometimes supposed, because he is charged with crime. You are to view his statements in the light of their consistency, their reasonableness and their probability, the same as the statements of any other witness, and you are to look at them in the light of the interest he has in the result of the case.”

If this could be, in any aspect, treated as a modification of the previous assertions of the court, it was too far separated from that connection to permit us to attribute that operation to it, and, moreover, it was in itself erroneous. As a witness, a defendant is no more to be visited with condemnation than he is to be clothed with sanctity, simply because he is under accusation, and there is no presumption of law in favor of or against his truthfulness.

Exception was taken, not with much precision, but, we are disposed to hold, sufficiently to save the point, to the following instruction, given in discussing the question of malice aforethought:

"Now, of course, you are to distinguish (and I have to be particular upon this point; I have my reasons for it, and it is not necessary to name to you what they are) between a case where a man prepares simply to defend himself and keeps himself in the right in that defense, and a state of case where he prepares himself recklessly, wantonly, and without just cause to take the life of another. If he prepares himself in the latter way, and he is on the lookout for the man he has thus prepared himself to kill, and he kills him upon sight, that is murder, and it would shock humanity or even the most technical and hair-splitting court to decide anything else. That can be nothing else but murder. If he is in the right—if he is in the right at the time of the killing—and simply prepared himself to defend his own life, that is preparation not to take the life of another, but preparation to defend himself. That is the distinction, a distinction that is clear and comprehensive." And also to this in reference to the exercise of the right of self-defense:

"The first proposition is as follows: 'A man who, in the lawful pursuit of his business'—I will tell you after a while what is meant by that. I will tell you, in short; in this connection, it means that the man is doing at the time just exactly what he had a right to do under the law. When so situated—'is attacked by another under circumstances which denote an intention to take away his life, or to do him some enormous bodily harm, may lawfully kill the assailant, provided he uses all the means in his power, otherwise, to save his own life or to prevent the intended harm—such as retreating as far as he can, or disabling his adversary without killing him,

if it be in his power.' Now, that means by its very language that the party was in the right at the time. If he was hunting up his father for the purpose of getting an opportunity to slay him without just cause and in the absence of legal provocation, he was not in the right, and the consequences would be that he would be deprived of the law of self-defense, as you will learn presently, when such a condition as that exists. Now, of course, in this connection—and I am thus particular again for certain reasons—you are to draw the distinction between a state of case where a man arms himself, where there is ill will, or grudge, or spite, or animosity, existing, and he hunts up his adversary and slays him, and the state of case where he simply arms himself for self-defense. He has a right to do the latter as long as he is in the right, but he has no right to do the former, and if he does the former, and slays because of that condition he is guilty of murder."

We are of opinion that defendant's objections to these portions of the charge are well founded. The hypothesis upon which the defense rested on the trial was, that John Allison had a gun with him on the morning of the tragedy, in order to hunt deer, and that his stopping at Farris' place, which was on his way to Rucker's, was accidental. His testimony to this effect was corroborated, and was not contradicted.

Justice and the law demands that, so far as reference was made to the evidence, that which was favorable to the accused should not be excluded. His guilt or innocence turned on a narrow hinge, and great caution should have been used not to complicate and confuse the issue. But the charge above quoted, ignored the evidence tending to show that defendant had not armed himself at all, but had a gun with him for purposes of sport, and that his halt at Farris' had no connection whatever with the deceased; and invited the jury to contemplate the spectacle of a son hunting up his father with the deliberately preconceived intention of murdering him, unrelied by allusion to defensive matter which threw a different light on the transaction.

If defendant were "in the right at the time of the killing," the inquiry as to how he came to be armed was immaterial, or, at least, embraced by that expression. If there were evidence, and as to this the record permits no doubt, tending to establish that defendant carried his gun that morning for no

purpose of offense or defense, then this disquisition of the court was calculated to darken the light cast on the homicide by the attendant circumstances as defendant claimed them to be; and of this he had just cause to complain, even though there were competent evidence indicating that he had harbored designs against his father's life, as frequently intimated by the court—intimations which we fear seriously trenched on that untrunneled determination of the facts by a jury to which parties accused are entitled.

As will have been seen, the theory of the defense was that defendant was in terror of his life, by reason of the threats of deceased to take it, and was, therefore, led to interpret the alleged menacing action of deceased as demonstrating an intention then and there to carry those threats into execution. The bearing of the previous threats then, was very important, and in relation to them, the trial judge admonished the jury as follows:

"Now, then, these mitigating facts which reduce the killing so as to make it manslaughter, can not be previous acts of violence exerted at some other time, and, so far in the past as that there was time for the blood to cool, or the party to think, or to deliberate—it can not be an act of that kind that can be taken into account to mitigate the crime. Nor can they exist in the shape of previous threats, made at some other time than the killing, or, if you please, if the proof had shown that they were made at the time of the killing, because threats of violence, mere threats of that character, can not be used to justify nor to mitigate a killing, unless they are coupled with some other condition which I will give you in connection with the law given you showing the figure that threats cut in a case. * * * If threats were made previous to the time of the killing, and they were not coupled with the condition that they may be used to illustrate, as I will give it to you presently, and the party kills because of those threats, that is evidence of spite, that is evidence of grudge, that is evidence showing that he kills because of ill will and special animosity existing upon his part against the party who is slain."

After much intervening discussion on other matters, the subject was returned to thus:

"You want to know, of course, what figure threats cut.

Evidence has been offered here of threats made by the deceased. You want to know what office they perform in the case, how you are to view them, whether you are to say that the law authorizes you to say that if a man has been threatened at some time previous to the killing, and that he kills because of these threats, or he kills when no overt demonstration of violence, really or apparently, is being made by the party slain, at the time, whether or not those threats can be taken into consideration by you to excuse that killing or to mitigate it. * * * Now, you see, they do not cut any office at all in favor of a defendant unless at the time, in this case, his father was doing some act, making some actual attempt, to execute the threat, as shown by some act or demonstration at the time of the killing, taken in connection with the threat, that would induce a reasonable belief upon the part of the slayer that it was necessary to deprive his father of life in order to save his own or prevent some felony upon his person. That is the law, stated plainly, as to the office of communicated threats. * * * If he (the deceased) was doing some act or making some demonstration that really or apparently was of a character that indicated a design to take life, then the defendant could couple previous threats made with the act or demonstration. Now, the act or demonstration must have gone sufficiently far to show a reasonable purpose or to induce a reasonable belief, when coupled with threats, under the circumstances, that that was William Allison's purpose at the time. It must have gone to that extent. It must have gone sufficiently far, the overt act done by him, as to induce a reasonable belief, when coupled with threats, that that was his purpose. * * * Now you see that no matter how many threats William Allison may have made against his family, and no matter to what extent this family broil had gone, this defendant, because of threats of that character, could not hunt him up and shoot him down because of those threats.

If that was the state of case the threats can not be considered in his favor, but they may be considered to show that he killed him because of malice, because of malice aforethought existing, because of a spirit of spite, or ill will, or grudge, that he was seeking to satisfy by that sort of attack."

Defendant excepted to so much of these instructions as

ruled that threats to take his life might be treated as constituting evidence of spite, or ill will, or grudge on his part.

In *Wiggins v. People*, 93 U. S. 465, it was held that, on a trial for a homicide committed in an encounter, where the question as to which of the parties commenced the attack is in doubt, it is competent to prove threats of violence against defendant made by deceased, though not brought to defendant's knowledge, for the evidence, though not relevant to show the *quo animo* of the defendant, would be relevant, under such circumstances, to show that at the time of the meeting deceased was seeking defendant's life. Wharton, *Crim. Ev.*, § 757; *Stokes v. People*, 53 N. Y. 174; *Campbell v. People*, 16 Illinois, 17; *People v. Scoggins*, 37 California, 676; *Roberts v. State*, 68 Alabama, 156. It is from the dissenting opinion in *Wiggins'* case that the trial judge indulged in quotation in connection with the undisputed proposition that a person's life is not to be taken simply because he has made threats.

Here the threats were recent and were communicated, and were admissible in evidence as relevant to the question whether defendant had reasonable cause to apprehend an attack, fatal to life or fraught with great bodily injury, and, hence, was justified in acting on a hostile demonstration and one of much less pronounced character than if such threats had not preceded it. They were relevant because indicating cause for apprehension of danger and reason for promptness to repel attack, but they could not have been admitted on a record such as this, if offered by the prosecution as tending to show spite, ill will or grudge on the part of the person threatened; nor could they, being admitted on defendant's behalf, if coupled with an actual or apparent hostile demonstration, be turned against him in the absence of evidence justifying such a construction. The logical inference was that these threats excited apprehension, and another and inconsistent inference could not be arbitrarily substituted. If defendant, to use the graphic language of the court, hunted his father up and shot him down merely because he had made the threats, speculation as to his mental processes was uncalled for. If defendant committed the homicide because of the threats in the sense of acting upon emotions aroused by them, then some basis must be laid by the evidence other than the threats themselves before a particular emotion, different from those they would

ordinarily inspire under the circumstances, could be imputed as a motive for the fatal shot.

What is or is not an overt demonstration of violence, varies with the circumstances. Under some circumstances a slight movement may justify instant action because of reasonable apprehension of danger; under other circumstances it could not be so. And it is for the jury and not for the judge, passing upon the weight and effect of the evidence, to determine how this may be.

In this case it was essential to the defense that the jury should be clearly and distinctly advised as to the bearing of the threats and the appearance of danger, at the moment, from defendant's standpoint, and particularly so as it did not appear that the deceased then had a pistol upon him, though there was evidence that it was his habit to carry one, and that he had had one immediately before.

We think that the language of the court, in the particulars named, is open to the criticism made in reference to like instructions under consideration in *Thompson v. United States*, 155 U. S. 271, 281, where we remarked: "While it is no doubt true that previous threats will not, in all circumstances, justify or, perhaps, even extenuate the act of the party threatened, in killing the person who uttered the threats, yet it by no means follows that such threats, signifying ill will and hostility on the part of the deceased, can be used by the jury as indicating a similar state of feeling on the part of the defendant. Such an instruction was not only misleading in itself, but it was erroneous in the present case, for the further reason that it omitted all reference to the conduct of the deceased at the time of the killing, which went to show an intention then and there to carry out the previous threats."

Other exceptions to parts of the charge were taken, but, while not to be understood as holding that there was no error in respect thereof, we do not feel called upon to prolong this opinion by their consideration, and they may not arise upon another trial.

Where the charge of the trial judge takes the form of animated argument, the liability is great that the propositions of law may become interrupted by digression, and so intermingled with inferences springing from forensic ardor, that the jury are left without proper instructions; their appro-

prate province of dealing with the facts invaded, and errors intervene which the pursuit of a different course would have avoided.

Judgment reversed and cause remanded, with a direction to set aside the verdict and grant a new trial.

NOTE.—*Witness—Competency of child.*—In *Com. v. Robinson*, 165 Mass. 426. The question of the competency of the testimony of a child of tender years is declared to be a matter resting largely in the discretion of the trial judge.

"The law fixes no limit of age," says the court, "which children must have reached in order to be competent as witnesses, and, unless for manifest error, we can not revise the decision of the presiding justice that the little girl in this case had sufficient intelligence and sufficient sense of the duty of telling the truth to enable her to testify. No such error appears in the present case. Although there is a certain incongruity in administering an oath to one who can not be convicted of perjury, nevertheless, the fact that the child was too young to be convicted of perjury is not decisive against her competency. Of course, upon the bill of exceptions, we have not to consider how much weight might properly be given to her testimony. She was a little over five years and five months old at the time of the alleged assault and a little over five years and nine months old at the time of the trial. In *Wheeler v. U. S.*, 159 U. S. 523 (a case which has come to our notice since the arguments), a new trial was refused where a child, younger at the time of the occurrence, and at the time of the trial, had been allowed to testify; and in that case there had also been a longer interval between the time of the occurrence and the time of the trial. That case is fully in point, and many recent decisions are cited. See, also, *Com. v. Lyles*, 142 Mass. 577; *McGuire v. People*, 44 Mich. 286; *Johnson v. State*, 61 Ga. 35."

PEOPLE v. HASBROUCK.

(11 Utah, 291.)

PRACTICE: *Constitutional law—Privileges of citizens—Physicians and surgeons—Law requiring them to submit to examination.*

1. The sufficiency in form of a criminal complaint will not be considered, when raised for the first time on appeal by a defendant, who admitted the commission by him of the alleged offense, and agreed on the trial to waive any formal objections, and that the case should be tried upon the question of the validity of the statute upon which the prosecution was based.
2. The prohibitions of the United States constitution against state legislation abridging the privileges of citizens are not violated by act March

- 10, 1892, applicable alike to citizens of Utah and of other states and territories, which authorizes the licensing, without examination, of medical graduates who were, but not those who were not, in actual practice at its passage, and also of persons who had practiced for ten years in the territory before the taking effect of the act, upon passing an examination, although without a diploma, while requiring others to have a diploma besides passing an examination.
3. Such act is not unconstitutional upon the ground that it makes no specific disposition of the fees collected from applicants, since, by providing a treasury of the board of examiners, and an income, the power is conferred by necessary implication to devote the fees to the payment of the necessary expenses.
 4. Nor is such act, in authorizing the board to ascertain and determine the qualifications of applicants to practice medicine, unconstitutional, as conferring judicial power on the board.
 5. Appointments of members of the board, are not invalid on the ground that none of them were by and with the advice and consent of the legislature, as provided by section 1 of the act, it having been passed on the last day of the session of the legislature, whose sessions are biennial, so that it would have been impossible to have procured such consent at that session or until the next session, held two years later.
 6. The failure of the governor to appoint the members of the board within a month after the offices came into existence, as provided by the act, did not invalidate the appointments, the provision as to the time of making such appointments being merely directory.

Appeal from the District Court of the Third Judicial District, Hon. H. W. Smith, Judge.

Richard A. Hasbrouck, upon conviction before Harmel Pratt, U. S. Commissioner, of practicing medicine without a license, appealed to the district court, and from a judgment of conviction in the district court, upon a trial *de novo*, appeals. Affirmed.

J. E. Cochran, Le Grand Young and J. H. Murphy, for appellant.

J. W. Judd, U. S. Attorney, for respondent.

MERRITT, C. J. The defendant in this case was convicted before Harmel Pratt, commissioner, of practicing medicine without a license, in violation of the provisions of the act of the territorial legislature entitled "An act to regulate the practice of medicine," approved March 10, 1892; and was fined \$50. On the 29th of May, 1893, an appeal was taken to the Third district court of Utah territory by the defendant. Thereafter, and on the 25th of January, 1894, the case was

heard in the district court before the Honorable H. W. Smith, presiding. A jury was waived, and the defendant was tried on the following agreed statement of facts: "That the defendant, Richard A. Hasbrouck, upon the 30th day of April, 1893, and from and after said date, continually, to the 6th day of May, 1893, practiced medicine and surgery at Salt Lake City, in Salt Lake county, Utah territory, and has so practiced medicine and surgery in said city and county since prior to the 10th day of March, 1892. That said defendant had received from the Bennett College of Eclectic Medicine and Surgery, in the year 1882, a diploma as a physician and surgeon, and has practiced medicine and surgery ever since receiving the same. That after the passage and approval of the act of the governor and legislative assembly of the territory of Utah entitled 'An act to regulate the practice of medicine,' approved March 10, 1892, the governor of the territory of Utah appointed seven persons as a board of medical examiners of Utah territory, to execute the duties in said act prescribed, and issued commissions to each of said persons as a member of said board. That none of said appointments were made by or with the advice or consent of the council of said legislative assembly, and none of said commissions were issued until after the adjournment of said assembly in 1892, and the last on December 20, 1892. That the day of the approval of said act, March 10, 1892, was the last day of the session of said legislative assembly in the year 1892. That the said seven persons so commissioned as aforesaid met on the 24th day of December, 1892, and organized as the board of medical examiners of Utah territory, and elected one of their members, Allen Fowler, M. D., as president of said board, and Charles C. Schinnick as secretary and treasurer thereof. That said board held regular meetings at Salt Lake City, aforesaid, on the first Monday in January, 1893, and on the first Monday in March, 1893, and numerous other meetings at the same place between the first Monday in January, 1893, and the 30th day of April, 1893, for the purpose of receiving and considering applications for license or certificates entitling the holders thereof to practice medicine and surgery in Utah territory, as provided and contemplated in said act, of which meeting the said defendant had notice. That said defendant has not at any time made application to said board for any license or certificate to entitle him to practice

medicine or surgery, as provided and contemplated in said act, and so practiced medicine and surgery as aforesaid without any such license or certificate having been issued to him by said board." The defendant was adjudged guilty as charged, and sentenced to pay a fine in the sum of \$50. From this judgment the defendant appealed to the supreme court.

Upon the question whether the complaint is sufficient in form the authorities are somewhat in conflict; but it is not necessary to pass upon that question, for it is stated by appellant's counsel that any objection to the form of the complaint was waived in the court below, and it was agreed between the prosecution and the defendant that the case should be tried upon the question of the validity of the statute upon which the complaint is founded, and of the validity of the appointment of the board of medical examiners by the governor. The agreed statement of facts, signed by the defendant, admits in so many words that upon the 30th day of April, 1893, and from and after said date, continuously to the 6th day of May, 1893, the time charged in the complaint, at Salt Lake City, in Salt Lake county, Utah territory—the place charged in the complaint—he practiced medicine and surgery without any license or certificate from the board of medical examiners. This was an admission of the ultimate fact to be proved by the prosecution, and dispensed with the necessity upon the part of the prosecution of producing evidence of the probative facts, from which the ultimate facts would be adduced, and dispensed also with any further consideration of the formal requisites of the complaint. "That the defendant, at the time and place named, practiced medicine without a license," if it could be held a conclusion, is the defendant's own conclusion, couched in the language of the statute, and set forth in the agreed statement of facts. Under these circumstances, an objection to the sufficiency of the complaint in form, raised for the first time on appeal will not be considered.

The statute upon which this prosecution is founded is of the same general character as the statutes of a large number of states upon the same subject—the regulation of the practice of medicine. The predominant characteristic and purpose of such statutes is to prevent the practice of medicine by incompetent and improper persons; to provide for the ascertainment and certification by a public officer or board of qualifications

to practice, and for the public registry of legally licensed physicians, and to prohibit and punish the practice of medicine by those who have failed or refused to obtain the prescribed license or certificate of qualifications. This statute provides for the appointment of a "board of seven medical examiners from various recognized schools of medicine," who shall qualify by taking an oath that they are "graduates of legally chartered colleges in good standing, and that they will faithfully perform the duties of their office."—Section 1. Section 2 provides that said board shall have the power to issue certificates to all who furnish satisfactory proof of having received degrees or licenses from chartered medical colleges in good and legal standing, and pass a satisfactory examination before said board; that said board "shall prepare two forms of certificates, one for persons examined and favorably passed upon by the board, the other for persons as provided for in section 11 of this act." Section 3 provides that the fee for the examination and certificate, as provided for in section 2, shall be \$25, which shall be paid to the treasurer of the board of examiners. Section 4 provides that "graduates of respectable medical colleges, who are at this time engaged in actual practice in this territory, shall be licensed to practice medicine under this act upon presentation of their degree to said board and upon producing satisfactory evidence of the identity of said applicant. The fee for such license shall be five dollars, to be paid to the treasurer of the board of examiners." Section 8 provides that "the board of medical examiners may refuse to issue the certificates provided for in this act to individuals guilty of unprofessional or dishonorable conduct, the nature of which shall be stated in writing, and it may revoke such certificates for like causes, to be stated in writing." Section 10 provides that "any person practicing medicine or surgery within the territory without first having obtained a certificate as herein provided for, or contrary to the provisions of this act, shall be deemed guilty of a misdemeanor." Section 11 provides that "all persons not graduates of medical colleges, who have practiced medicine ten years continuously in this territory, prior to the taking effect of this act, shall upon proper application and payment of the fee for examination as provided in section 3 of this act, accompanied by a petition signed by twenty five legal voters living

in the city or precinct where such applicant practices, be admitted to examination before the board of medical examiners, and if satisfactory shall receive such certificate, unless it shall be ascertained and determined by the board of medical examiners that the person so applying for a certificate is of immoral character or guilty of unprofessional or dishonorable conduct, in which case said board may reject such application, and provided that such application for a certificate shall be made within six months after the taking effect of this act; and all persons holding a certificate on account of ten years' practice shall be subject to all the requirements and discipline of this act in regard to their future conduct in the practice of medicine, the same as all other persons holding certificates. And all persons not having applied for or received such certificates within six months after the taking effect of this act, and all persons whose applications have, for cause herein named, been rejected or certificates revoked, shall, if they practice medicine, be deemed guilty of practicing in violation of law, and shall suffer the penalties herein provided." And in section 15 it is provided that "the term respectable medical colleges in this act shall include colleges in legal standing of any recognized school of medicine." The other sections of the act relate to the public registry of physicians' licenses, meetings of the board, and other matters not necessary to be recited.

That legislation of the general character enacted in this statute—namely, legislation to protect the community against the effects of ignorance and incapacity, as well as deception and fraud in the practice of medicine, by requiring a certain degree of learning and skill upon the part of the practitioner, "ascertained upon an examination by competent persons, or inferred from a certificate in the form of a diploma or license from an institution established for instruction on the subject," is a legitimate exercise of the police power of the state, and that depriving persons not so qualified of the right to practice, is not obnoxious to the inhibition of the federal constitution against the deprivation of property without due process of law, are propositions which are thoroughly settled. *Dent v. West Virginia*, 129 U. S. 114; *Tied. Lim.*, §§ 87, 88; *Cooley, Torts*, p. 289. This general proposition is admitted by the appellant, but he attacks the statute as violative of the con-

stitutional provisions that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, in that graduates of respectable medical colleges who were at the time of the passage of the act engaged in actual practice of medicine in the territory may be licensed, under section 4 of this act, without examination, and upon the payment of a fee of only \$5; while citizens of a state or other territory who were likewise graduates of respectable medical colleges, but who were not engaged in actual practice in this territory at the time of the passage of the act, are not entitled to such privilege, but in addition to presenting their diplomas and making proof of their identity, must also submit to an examination as to their qualifications to practice, and must pay a fee of \$25.

This statute does not contravene this provision of the constitution; nor does it contravene that part of the fourteenth amendment which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;" nor is the statute obnoxious to either of these constitutional provisions by reason of the fact that persons who have practiced medicine for ten years continuously in this territory prior to the taking effect of the act may be licensed to practice upon passing a satisfactory examination, although without a diploma, while others are required both to pass an examination and to possess a diploma. The plain answer to the appellant's objection is that these provisions of the statute are not directed against the citizens of other states. They do not abridge any of their privileges or immunities. They do not withhold from them any privileges or immunities which are not withheld also from citizens of Utah similarly situated. "Citizens of other states are entitled to practice medicine and surgery here on precisely the same terms, and subject only to the same restrictions as our own citizens." Even if it were true that one of the sorts of qualifications is such that none but the citizens of Utah could possess it, this would not render the act obnoxious to this provision of the constitution. *Ex parte Spinney*, 10 Nev. 333; *Harding v. People*, 10 Colo. 387.

It is contended by the appellant that the statute is unconstitutional, because, as he claims, no disposition is directed of the fees authorized by sections 3, 4 and 11 of the act. The

act creates a treasury and a treasurer of the board. It provides fees shall be paid to the treasurer; that is, into the treasury of the board. The board is a board of public officers, created for a public purpose, charged with the performance of important public duties, in the exercise of which various expenditures must necessarily be made. That the board shall have power to incur and pay expenses is not only implied from its very necessity, but distinctly appears from the provision of section 12 that the fees received from applicants to practice obstetrics shall be applied toward defraying the expenses of said board. It is argued by the appellant that the latter provision defines the limit to which expenses may be paid out of the fees received; that the act appropriates only the fees received from applicants for license to practice obstetrics to the payment of the board's expenses; and that all other fees are exacted for no definite purpose, and are therefore illegal.

But there is nothing in the act to show that the legislature contemplated that the fees mentioned in section 12 would be sufficient to defray all the expenses of the board, nor does the mere absence from the other sections of a provision similar to that contained in section 12, afford any ground for arguing that the other classes of fees were not intended to be devoted to the same purpose. The language of section 12, on the contrary, seems to clearly imply that the legislature contemplated the fees mentioned in that section as only one of the sources from which the expenses of the board should be paid. The phrase, "to be applied toward" defraying, etc., is the language appropriate to a case in which it is contemplated that a particular source of revenue will be sufficient to pay only a part of the required outlay. It is unnecessary to determine whether the compensation of the members of the board for their official services may not be one of the expenses which the board is authorized to pay out of its treasury. It is sufficient to say that the act, by necessitating expense in its execution, in creating a board treasury, and providing an income, clearly implies a power to devote that income to the payment of necessary expenses. The fees provided for are all manifestly intended to meet the cost of executing the law, and are therefore legitimate and proper license fees, whether the actual cost of executing the law has been overestimated, or underestimated, or correctly estimated in fixing the amount of fees.

The objection that the statute attempts to confer judicial power on the board is not well founded. Many executive officers, even those who are spoken of as purely ministerial officers, act judicially in the determination of facts in the performance of their official duties; and in so doing they do not exercise "judicial power," as that phrase is commonly used, and as it is used in the organic act, in conferring judicial power upon specified courts. The powers conferred on the board of medical examiners are no wise different in character in this respect from those exercised by the examiners of candidates to teach in our public schools, or by tax assessors or boards of equalization in determining, for purposes of taxation, the value of property. The ascertainment and determination of qualifications to practice medicine by a board of competent experts, appointed for that purpose, is not the exercise of a power which appropriately belongs to the judicial department of the government. It does not trench upon the judicial power. *Williams v. State*, 113 Ind. 514; *State v. State Board of Medical Examiners*, 34 Minn. 387. This act entitles every person whose qualifications to practice medicine, in point of learning and skill, or in point of moral character, is in any manner drawn in question, to a hearing before the board. It would be absurd to contend that the courts must be converted into boards of medical examiners to ascertain and decide whether an individual possesses such technical knowledge or such moral character that he may be permitted to practice medicine with safety to the public, or whether the institution from which he holds a diploma is a "respectable medical college," or, on the other hand, a fraud or an institution whose instruction is unfit to properly and decently prepare its graduates for practice. The determination of these and kindred questions relating to the fitness of an individual to carry on an occupation, requiring for its safe and proper conduct, a person of decent moral character, or to engage in an occupation requiring special knowledge, care and prudence, such as that of a pilot, or many others which may be mentioned, including, of course, the practice of the professions of law and medicine, may constitutionally be and is very properly devolved everywhere upon boards of inspection composed of experts in the particular occupation in question. The right of every person whose qualifications, mental or moral, are to be determined by this board, to

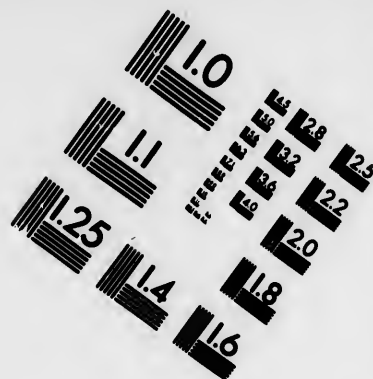
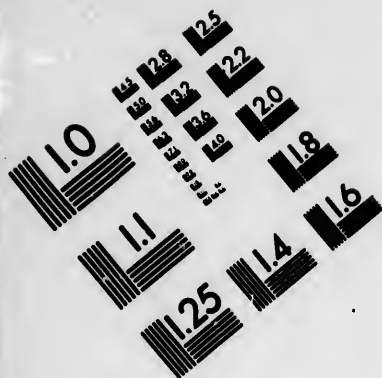
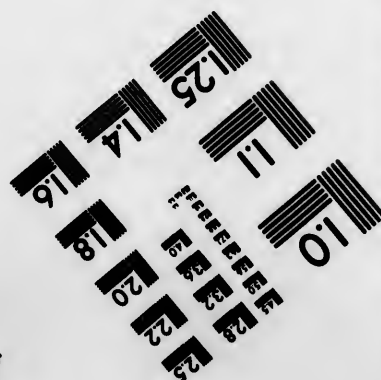
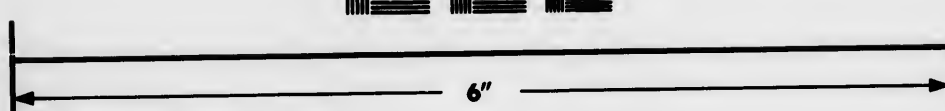
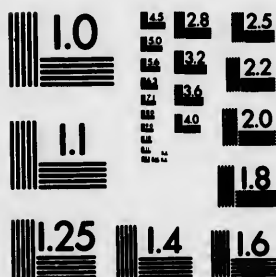


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a hearing before it, is clearly implied by the provisions for the administration or oaths and the taking of testimony "in all matters relating to its duties," and from other provisions of the act. If the board should, through malice, or prejudice, or dishonesty, arbitrarily refuse or revoke a license, the injured party would have his remedy by appropriate proceedings in the courts, and the board would be restrained from doing or compelled to undo the wrong. But, if the action of the board is in good faith, its final determination of qualification is not obnoxious to any constitutional provision. Due process of law is not necessarily judicial process. *Ex parte Wall*, 107 U. S. 265; *State v. State Board of Medical Examiners*, 34 Minn. 389; *Railroad Co. v. Backus*, 133 Ind. 513; 33 N. E. 421. A uniform rule and a uniform process for ascertaining and determining qualifications, as prescribed by this act, operating equally on all persons, affording to all persons the right to establish their qualification before the board, this is due process of law.

The validity of the appointment of the board acting at the time specified in the complaint is challenged upon the ground that none of the members were appointed by, and with the advice and consent of, the council, as provided in section 1 of the act. It may be noted, in the first place, that not only was the act approved on the last day of the session of the legislature which enacted it, but, there being no specified time mentioned in the act upon which it should go into effect, it would take effect, under the provisions of Section 2973 of the Compiled Laws, upon June 1, 1892. It was therefore legally impossible for the governor to appoint a board of medical examiners by and with the advice and consent of the upper house of the legislature which passed the act. The provision that the governor shall appoint the board upon the passage of this act, is to be construed as equivalent to a provision that he should appoint upon the taking effect of the act. *Harding v. People*, 10 Colo. 387.

To assume that the legislature intended to create offices which could not be filled until the next biennial session, to make a law which could not be executed for two years, although legally in effect on the 1st day of June next following its enactment, would be an absurdity. But the power of the appointing executive, under such a provision as that contained in this act and in section 7 of the organic act, to fill a

vacancy, when such vacancy occurs during the recess of the confirming legislature or legislative body, has been frequently recognized as a necessary incident of the executive power. Such an appointment by the governor of this territory, without the advice or consent of the council, to an office validly created by the legislature, but which had never been legally filled, was recognized by the Supreme Court of the United States in the case of *Clayton v. Utah Territory*, 132 U. S. 632. The validity of the appointment made by the governor alone during the recess of the legislature has received the further sanction of long-continued practical recognition in all the departments of the territorial government. The offices created by this act came into existence June 1, 1892, and were vacant; and, although they had not become vacant by the death or resignation of any incumbent, it was clearly the duty of the executive to fill them, and put the law into execution. The provision in the statute for the filling of vacancies by the governor was in itself a sufficient warrant for his action, although his power to do so might well be rested on other grounds. His failure to make the appointments within a month after the offices came into existence did not invalidate them, that provision being clearly directory. The board was validly appointed.

For the reasons stated in this opinion, the judgment of the court below is affirmed.

NOTE.—Sufficiency of complaint—Waiver.—The import and meaning of the language used by the learned judge in the above cause might be calculated to mislead. If the complaint was sufficient to give the commissioner jurisdiction of the cause and the parties, the district court had jurisdiction on appeal; and as the offense was not even an indictable misdemeanor, the defendant could consent to any amendment of the complaint, or agree to any usual mode of trial. Of course, the case would be different if the offense was a felony or an indictable misdemeanor. It is unnecessary to do more than call attention to the uniform rule of law that a defendant can not consent to an amendment of an indictment, or confer jurisdiction on a court by consent in felony cases.

Exceptions in statute—When not necessary to negative in information.—By act of the legislature of 1891, of Nebraska, to establish a state board of health and regulate the practice of medicine in the state of Nebraska, it was made unlawful for any person to practice medicine, surgery, or obstetrics, or any of the branches thereof, without first having obtained and registered a certificate from the state board of health as provided in the act. *O'Connor v. State*, 46 Neb. 157.

The exceptions made by section 11 of this act were not from the opera-

tion of the portion of the law which required a certificate to be obtained from the state board of health, and its registration by persons practicing medicine, surgery, or obstetrics. After the expiration of six months from the passage of the act, the persons designated in the exceptions were as liable to prosecution, for non-compliance with the law in these particulars, as any others, and the subject of the exception did not become a part of the description of the offense of non-compliance with the provisions of the act, or limit or qualify the language of the act creating such offense, nor was any negative averment in regard to the exceptions necessary in an information charging a person with practicing medicine, etc, without having complied with the provisions of the act. *Id.*

The decision in the case of *Gee Wo v. State* 86 Neb. 241, overruled to the extent that it held that a negative averment in regard to the matter of the exceptions, contained in section 11 of the act referred to, was necessary in the information filed in that case. *Id.*

In an information, it is necessary to state specifically the essential facts constituting the crime charged. *Id.*

STATE V. ABSHIRE.

(47 La. Ann. 542.)

PRACTICE: *Continuance of criminal case—Application—Affidavits taken as true—Discretion of court.*

1. No delay is provided by law for arraignment, after an indictment, in order to enable an accused to prepare his preliminary defenses. Such an indulgence is within the discretion of the trial judge.
2. The well-established rule applicable to motions for continuance in criminal cases is that the affidavit of the accused for a continuance is, for the purposes of the motion, taken as true; and no counter affidavit nor evidence *aliunde* can be received *pro* or *con*.

Appeal from District Court, Parish of Acadia; W. C. Perrault, Judge.

Sylvester Abshire was convicted of murder, and appeals. Affirmed.

A. & Chas. Fontelieu and *Chas. W. Du Roy*, for appellant.
M. J. Cunningham, Atty. Gen., *E. B. Du Buisson*, Dist. Atty. (*E. P. Veazie*, of counsel), for the State.

WATKINS, J. The accused appeals from a verdict of guilty of murder and sentence to death, relying on several bills of exception. The first one to which brief of counsel challenges

attention was retained to the refusal of the judge to grant additional time before arraignment to prepare the prisoner's preliminary defenses. The bill of exceptions relates "that the offence with which he stands charged is alleged to have been committed on the 31st of December, 1894; that the grand jury was impaneled on the 2d day of January, 1895; that he employed counsel on the 3d day of January, 1895; that on the 4th of January, 1895, the grand jury returned a true bill against him for the crime of murder;" that his counsel was summoned by telegram, and arrived on the 4th of January, 1895; "that no sufficient time has been granted his said counsel in order to prepare his preliminary defenses." For overruling defendant's motion, the trial judge assigns the following reasons, viz.: "There was no denial of the request for additional time. On the contrary, all the time asked for was granted by the court, and the arraignment was postponed from the 4th to the 5th of January; and on the 5th of January, when called for arraignment, the defendant asked for no additional delay in which to plead, but stood mute, and the court directed the plea of 'not guilty,' to be entered for him. Besides, the law provides no delay for arraignment after indictment or information, and the defendant is required to plead when arraigned, which is his only time as of right. *State v. Shields*, 33 La. Ann. 1410; Whart. Cr. Pl., § 417; 1 Bish. Cr. Pl., § 733." Counsel questions the accuracy of the judge's statement, and refers to the entry on the minutes to show that in point of fact no delay was granted at all; and to show, further, that the application for delay was made on the 5th of January, and not on the 4th, and that he was called into court and coerced to plead on the same day that the motion was made. But of what avail was that, if the accused had not the legal right to delay? This question was passed upon in *State v. Shields*, 33 La. Ann. 1410, and the court say: "Exception taken to the ruling of the court in requiring him to plead at the time of his arraignment, and, on his refusal, in ordering the plea of not guilty to be entered in his behalf; the complaint being that he was arraigned on the same day on which the indictment was found, and had not time to determine on his plea. The law provides no delay for arraignment after indictment or information, and the defendant is required to plead when arraigned, which is his only time as of right. 1 Bish. Cr. Proc., § 734. Indulgence

is often granted in the discretion and leniency of the court, but there is no law controlling such discretion." [Our italics.] This decision seems to settle the question completely, and leave no room for dispute, and the trial judge seems to have followed its precepts; and, in so doing, committed no error. *State v. Moultrie*, 33 La. Ann. 1146, is not applicable, as it relates to the question of time to procure the services of counsel, the attendance of witnesses, and to make preparation for the defense of the accused; not one of these being an incident to the prisoner's arraignment.

The second bill of exceptions to which our attention has been attracted, is that relating to the refusal of the judge to allow the introduction of testimony in support of defendant's motion for a continuance of the cause until the next regular term of court; it being predicated on the ground that it was impossible to obtain a fair and impartial trial at the then pending term of the court, the popular excitement against the defendant being so strong as to intimidate and swerve the jury. The bill of exceptions relates "that the defendant moved for a continuance of this cause until the next regular term of the court, in order to allow popular prejudice and excitement to allay, so as to secure him a fair and impartial trial, as it was impossible at this term of the court to obtain a fair and impartial trial, due to said excitement and prejudice existing against him," etc.

The trial judge assigned the following reasons for his ruling, viz.: (1) That it "was manifest to the court, from all the circumstances surrounding the motion, that the same was made for the purpose of delay." (2) "That the court was satisfied that a fair and impartial trial could be had at the present term of the court, and that there was no prejudice against the accused in the public mind sufficient to influence his trial. It is conclusively shown by the answers of the jurors of the regular panel that they were unprejudiced and competent under the law. That this motion is fatally defective in failing to show by its recitals that a fair trial could be had at the term to which it is sought to postpone the case. On the face of the motion, had it been granted, no substantial relief would have been accorded the mover, since it is not shown that the alleged prejudice existed in the public mind," etc. During the progress of the trial of this motion, the following

bill of exceptions was taken, and it makes the following relation of facts, viz.: "Which motion," fully setting out the grounds of his affidavit for a continuance, and appending thereto a supplemental statement of the facts the defendant proposed to prove in aid of his affidavit for a continuance, "having been called for trial, counsel for defendant moved for a note of evidence to be opened, and proof adduced in support of said motion," etc. This was objected to on the part of the state; and the court sustained the objection on the grounds, viz.: "If the motion had any merit, it is amply sustained by its own allegations, and affidavit thereto; and evidence *aliunde* would make it no stronger. It has long been settled jurisprudence in this state that the facts stated in an affidavit in support of a motion for continuance must, for the purposes of the motion, be taken as true. *State v. Moultrie*, 33 La. Ann. 1146; *State v. Bolds*, 37 La. Ann. 312."

We have taken these two bills of exceptions together, for the purpose of more easily examining and deciding the questions therein raised. Taking up the proposition first stated, though last decided, we find that *State v. Moultrie*, 33 La. Ann. 1146, and *State v. Bolds*, 37 La. Ann. 312, support the ruling of the trial judge. And the rule is elaborated in *State v. Simien*, 30 La. Ann. 296, and announced in precise terms, thus: "The rule is that the affidavit of the accused, upon which is grounded his motion for a continuance, is, for the purposes of the motion, to be taken as true, and no counter affidavit can be received, nor can the statements or facts it contains be contradicted by a cross-examination, or *aliunde* proof; and this rule is of such universal acceptance that we are not inclined to modify it. 1 Archb. Cr. Prac., p. 569, *et seq.*"

This is an ancient and well-established rule of the common law, and we will not make a departure from it. But while the judge correctly adhered to this rule, and declined to hear any extraneous proof in support of the motion, because of the fact that the recitals of the affidavit and motion must, for the purposes of the application, be taken as true, he was not inconsistent in ruling that the defendant was not entitled to a continuance on the grounds he assigned for thus ruling. It was clearly within the judge's sound legal discretion to disallow a continuance when, from the circumstances surrounding the application, he believed it was made for the purpose of delay.

It was equally within his discretion to refuse a continuance, the application for which failed to disclose that a fair and impartial trial could be had at the term of court to which it was proposed to defer it. The existence of popular excitement against the accused is not a sufficient cause for the postponement of a trial unless it be sufficient "to intimidate and swerve the jury." Mr. Bishop states the rule thus: "Continuances are frequently applied for on the ground that the public mind is excited against the party, so that he can not now have a fair trial, which he may when the excitement subsides. In some circumstances, this appeal to the judicial discretion is successful. * * * Nor is mere excitement alone, in ordinary cases, especially in cases not of a public character, deemed adequate." 1 Bish. Cr. Proc., § 951b; *Thomas v. State*, 27 Ga. 287; *Thompson v. State*, 24 Ga. 297. And Mr. Wharton says: "A continuance may also be granted on affidavit showing that *means had been improperly taken to influence the jury, and the public at large*, so as to prevent, at that time, an impartial trial; and that the public excitement was such as *to intimidate and swerve the jury*." [Our italics.] But the fact of ordinary newspaper paragraphs existing on the subject is not enough." Whart. Cr. Pl., § 508. In the first place, the defendant's motion does not state that "means had been taken improperly to influence the jury," so as to prevent, at the time, a fair and impartial trial, nor does it state that the public excitement was such as to "intimidate and swerve the jury;" the statement being "that it was impossible at [the then] term of the court to obtain a fair and impartial trial, due to said excitement and prejudice existing against him," etc. But we have the contrary statement of the trial judge, to the effect that it was "conclusively shown by the answers of the jurors of the regular panel that they were unprejudiced, and competent under the law;" thus putting the defendant's case outside of the rule announced by either Bishop or Wharton. Again, the trial judge appears to have properly and judiciously exercised his discretion in refusing a continuance of the cause to another term.

The next and last bill of exceptions relates to the refusal of the judge to grant a change of venue. The bill relates that the district attorney, following the rule that was recognized in *State v. Causey*, 43 La. Ann. 897, 9 South. 900, suggested to

the court that the jurors of the regular panel be put upon their *voir dire*, and interrogated upon the subject of undue excitement and prejudice against the accused. And the judge relates that this course "was adopted by the court without objection from the defendant's counsel;" and that "this test showed conclusively, and to the satisfaction of the court, that the regular jurors were competent to try the case fairly and impartially." In the Causey case we said: "The fact that a fair and impartial jury has been obtained pending the motion for a change of venue has been held to be an answer to the affidavit therefor;" citing the authorities. "Indeed, *ab actu ad posse, valet consecutio*; the actuality of a fact demonstrates the possibility of its existence." We observe that the brief of defendant's counsel does not discuss this question, but we have adverted to it because it, in our opinion, confirms the correctness of the conclusions of the trial judge in reference to his discretion to grant a continuance. We have gone over all the questions that are propounded by the defendant's bills of exception without discovering any error in the ruling of the judge. Judgment affirmed.

NOTE.—Continuance—Denial of continuance upon admissions by the prosecution. Right of accused to meet witnesses face to face.—An admission by the prosecution that witnesses for whom a continuance is desired would testify as alleged if they were present, has been held sufficient in the following cases: *Comerford v. State*, 23 Ohio St. 599; *State v. Hatfield*, 73 Mo. 518; *Hamilton v. State*, 32 Ind. 552; *Lea v. State*, 64 Miss. 294.

In *State v. Mooney*, 10 Iowa, 506, a refusal of continuance was held proper on an admission that if the witnesses were present defendant could "prove by them his previous good character."

In Illinois a statute providing that the prosecuting attorney shall not be required to admit the absolute truth of the matter set up in an affidavit for a continuance in order to prevent the continuance for a material witness, but only that such witness, if present, would testify as alleged in the affidavit, was in question in *Hoyt v. People*, 140 Ill. 588, and it was held that the denial of a continuance under this statute on an application made at the second term was in the discretion of the court.

The court cites this case with approval in the recent case of *Keating v. People*, 160 Ill. 480.

The later Indiana cases overrule the decision in *Hamilton v. State*, 32 Ind. 552, and require an unconditional admission of the truth of the facts which the witness is desired to prove as a condition of denying a continuance, basing this decision on the constitutional right of the accused to "meet the witnesses face to face and to have compulsory process for obtaining witnesses in his favor." *McLaughlin v. State*, 8 Ind. 281; *Miller v. State*, 9 Ind. 340; *Wassels v. State*, 26 Ind. 35. The Supreme Court of

Missouri has established the doctrine that an admission by the prosecuting attorney that an absent witness, if present, would testify as set forth in an affidavit for a continuance can not be made by statute a sufficient ground for refusing the continuance under a constitutional provision that the accused shall have the right "to have process to compel the attendance of witnesses in his behalf." *State v. Berkley*, 10 West. Rep. 67; 92 Mo. 41; *State v. Dawson*, 6 West. Rep. 401, 90 Mo. 149; *State v. Neider*, 13 West. Rep. 123, 94 Mo. 79; *State v. Warden*, 14 West. Rep. 496, 94 Mo. 648; *State v. Dyke*, 96 Mo. 298; *State v. Loe*, 98 Mo. 609.

So in Texas, the admission must be of the facts which the absent witnesses are desired to give evidence upon. *Hyde v. State*, 16 Tex. 457; *De Warren v. State*, 29 Tex. 464.

An affidavit for a continuance on account of the absence of a material witness, an admission by the prosecution that the "facts are true," which witness would testify to if present, is made necessary by a statute of Kentucky, in order to prevent a continuance for a material witness. *Pace v. Com.*, 11 Ky. L. Rep. 407; *O'Brien v. Com.*, *Id.* 534.

In *People v. Brown*, 50 Cal. 345, the refusal to postpone a trial for an absent witness was held not error where the district attorney admitted the fact. See also *People v. Dodge*, 28 Cal. 445.

How far the state is bound by the admission.—As the prosecution simply admits that if the witness were present, he or she would testify as stated in the affidavit, this admission does not prevent the state from giving evidence to contradict such alleged facts. *Olds v. Com.*, 3 A. K. Marsh. 465; *State v. Miller*, 67 Mo. 604.

It has been decided that the credibility of absent witnesses can not be impeached where there has been an admission that if present they would testify to certain alleged facts. *Dominges v. State*, 7 Smedes & M. 475, 45 Am. Dec. 315. We can perceive no good reason for such a rule. In Mississippi this rule was altered by statute so as to give the affidavit only the effect that the witness' testimony would have if he was present. *Brent v. Heard*, 40 Miss. 370.

Motion in arrest of judgment.—A motion in arrest of judgment lies only for such errors as are apparent on the face of the record, or for some matter which ought to appear of record, but does not. *State v. O'Brien*, 18 R. I. 473; *U. S. v. Kilpatrick*, 16 Fed. Rep. 765; *State v. Lanier*, 90 N. C. 714. But the errors which would justify a motion of this sort must be errors of substance, and not merely clerical or formal mistakes. According to Blackstone, "arrests of judgment arise from intrinsic causes appearing upon the face of the record." 3 Bl. Comm. *393. As a general rule, any defect of substance which would be fatal on general demurrer may be taken advantage of after verdict, by motion in arrest of judgment; but judgment will not be arrested for defects in the proceedings which are merely formal. Such defects are amendable in Rhode Island under Pub. St. R. I., c. 248, § 4. See Whart. Crim. Pl. (8th Ed.), §§ 760-762; *State v. Paul*, 5 R. I. 185, 189; *State v. Corbett*, 12 R. I. 289, 293.

The plea of *nolo contendere*, interposed by the defendant, like a demurrer, admits, for the purposes of the case, all the facts which are well pleaded; that is to say, it is a confession of guilt, so far as this particular case is concerned, and places the defendant in the same position, for the purposes

of this motion, as though he had pleaded guilty, or been found guilty by the verdict of a jury. *State v. O'Brien, supra.*

Where an indictment is returned by the grand jury "a true bill," and sets forth in apt language the crime charged, the record need not show, independently of such indictment, that an indictment was presented against defendant, and that it was returned "a true bill," and set forth the offense charged. *Id.*

Leave to withdraw plea of guilty discretionary with court.—A motion in a criminal case to withdraw a plea of guilty, and to substitute therefor one of not guilty, is addressed to the discretion of the court, and, consequently, the court's action is not the subject of error. *Clark v. State, 57 N. J. L. 489.*

Defendant in this case was indicted for misdemeanor. In cases of felony of a grave nature, and especially in capital cases, if the prisoner was influenced to enter the plea, either by his own attorney or by the prosecution, or by act of the court, he ought to be accorded the right of trial by a jury, unless it has become impossible, by reason of the delay, to introduce the testimony of a material witness.

STATE v. ZEIGLER.

(40 W. Va. 503.)

JUSTIFIABLE HOMICIDE: *Misleading Instructions — Sufficiency of Evidence.*

1. To reduce homicide in self-defense to excusable homicide, it must be shown that the slayer was closely pressed by the other party, and retreated as far as he conveniently or safely could, in good faith, with the honest intent to avoid the violence of the assault.
2. Where one, without fault himself, is attacked by another, in such a manner or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, and the person assaulted has reasonable ground to believe, and does believe, such danger is imminent, he may act upon such appearances, and without retreating, kill his assailant.
3. It is error in a court, in a case of felony, to give to the jury instructions which are not relevant to the evidence, and which may mislead the jury to the prejudice of the defendant.
4. If there be, in the opinion of the jury, a substantial conflict in the evidence, or circumstances, as to whether the killing was done in self-defense, and the circumstances or other evidence preponderate in favor of self-defense, or if it was equally balanced as to the killing being done in self defense, the jury ought not to convict either of murder or manslaughter.
5. Where a court which tries a cause certifies all the evidence adduced on

the trial, and from the evidence so certified it clearly appears that it was wholly insufficient to sustain the verdict, this court will set aside the verdict, and, in a proper case, award a new trial.

Error to Circuit Court, Morgan County.

Rudolph Zeigler was convicted of manslaughter, and brings error. Reversed.

D. B. Lucas, for plaintiff in error.

F. W. Brown, and *Att'y Gen. Riley*, for the State.

ENGLISH, J. At the April term of the Circuit Court of Morgan County, in the year 1894, the grand jury of said county found an indictment against Rudolph Zeigler, charging that on the 13th day of February, 1894, in said county of Morgan, he feloniously, wilfully, maliciously, deliberately, and unlawfully did slay, kill, and murder one John Sautters, against the peace and dignity of the State.

The plea of not guilty was interposed, issue joined thereon, and the case was submitted to a jury on the 1st day of May, 1894, which resulted, on the 9th day of the same month, in a verdict of not guilty of murder as charged in the indictment, but guilty of voluntary manslaughter. A motion was made in arrest of judgment, and for a new trial, which motions, having been argued, were overruled by the court, and the prisoner excepted. Judgment was rendered upon the verdict, and the prisoner was sentenced to confinement in the penitentiary for the period of two years, and the prisoner obtained this writ of error.

Self-defense was relied on by the prisoner, and it appears from bill of exceptions No. 8, that after the evidence was concluded, and before the argument commenced, the prisoner, by his counsel, prayed the court to give the jury the following instructions: Instruction No. 1 for defendant: "The court instructs the jury that if, from the evidence, the jury be of opinion that there is a substantial conflict of the evidence or circumstances as to whether the killing was done in self-defense, and the circumstances or other evidence preponderate in favor of self-defense, or if it was equally balanced as to the killing being done in self-defense, the jury can not convict the prisoner either of murder or manslaughter." Instruction No. 2: "The court instructs the jury that the owner of property, in

the possession of the same, has the right to use as much force as is necessary to prevent a forcible trespass; and if they find that the defendant was standing upon his own ground, and that in attempting to force a passage over the same, if they so find, the deceased was violating the law, and was a trespasser, with the intent and with the means to commit a felony if necessary to accomplish the end intended, then the defendant, as owner of the property, if they so find, might repel force by force, to the extent of killing the aggressor, and such killing would be self-defense." Instruction No. 3: "The court instructs the jury that a party who is assailed by his adversary with a deadly weapon is not compelled to retreat, but may slay his adversary, if the assault be so fierce as not to allow the party assailed to retreat without manifest danger to his life, or enormous bodily injury. In such case, if there be no other way of saving his own life, he may, in self-defense, kill his assailant." Instruction No. 4: "The court instructs the jury that if, when the deceased fired the fatal shot, he was not the aggressor, but was assailed, and such demonstrations of force, with a deadly weapon and otherwise, made against him as to lead a reasonable man to suppose he was in danger of death or great bodily harm, and under such reasonable apprehension he killed the deceased, who was assailing him, if they so find, then the killing was justifiable, in self-defense." Which instructions were objected to by the State, and the court declined to give them, and the prisoner excepted; and the court, on its own motion, gave to the jury, in lieu of said instructions, the following: Instruction No. 1: "The court instructs the jury that when one, without fault himself, is attacked by another in such a manner or in such circumstances as to furnish reasonable grounds for apprehending a design to take away his life or to do him some great bodily harm, and there are reasonable grounds for believing the danger imminent, that such design will be accomplished, and the person assaulted has reasonable grounds to believe, and does believe, that such danger is imminent, he may act upon such appearance, and, without retreating, kill his assailant, if he has reasonable grounds to believe, and does believe, that such killing is necessary in order to avoid the apparent danger; and the killing, under such circumstances, is excusable, although it may after-

wards turn out that the appearances were false, and there was in fact neither design to do him serious injury, nor danger that it would be done. But of this the jury must judge, from all the evidence and circumstances in the case." No. 2: "And the court further instructs the jury that as to the imminency of the danger which threatened the prisoner, Rudolph Ziegler, and the necessity of his killing John Santters, in the first instance, the prisoner is the judge, but he acts at his peril, as the jury must pass upon his action in the premises, viewing said actions from the prisoner's standpoint at the time of the killing, and if the jury believe, from the facts and circumstances in the case, that the prisoner had reasonable grounds to believe, and did believe, the danger imminent, and that the killing was necessary to preserve his own life, or to protect him from great bodily harm, he is excusable for using a deadly weapon in defense, otherwise he is not." No. 3: "The court instructs the jury that, on a trial for murder where a deadly weapon is used, if the prisoner relies on self-defense, the burden of proof is on the prisoner, and he must excuse himself by a preponderance of the evidence." No. 4: "The court instructs the jury that the defendant is, by law, presumed to be innocent, and it is the duty of the State to prove him guilty, as charged in the indictment, beyond all reasonable doubt; and, if the State fails to prove every material allegation in the indictment, then the jury must find him not guilty."

The court also, at the instance of the State, gave the jury the following instructions, which were excepted to by the prisoner. The exceptions were overruled by the court. Instruction No. 1: "The court instructs the jury that under an indictment for murder the jury may find the prisoner guilty of murder in the first degree, or guilty of murder in the second degree, or guilty of voluntary manslaughter, or guilty of involuntary manslaughter, or not guilty." Instruction No. 2: "The court instructs the jury that, where a homicide is proven, the presumption is that it is murder in the second degree. If the State would elevate it to murder in the first degree, she must establish the characteristics of that crime; and, if the prisoner would reduce it to manslaughter, the burden of proof rests upon him to establish the same by preponderance of evidence." Instruction No. 3: "The court instructs the jury that if they believe from the

evidence that John Sautters came to his death by a pistol shot wound inflicted by Rudolph Zeigler, and at the time he was so killed the said John Sautters was in the exercise of a right that belonged to him, of passing along a private right of way, and that Rudolph Zeigler at said time was wrongfully preventing his passage along said right of way, and in so doing, wilfully and maliciously, deliberately and premeditatedly, inflicted the wound by which said Sautters came to his death, then he is guilty of murder in the first degree." Instruction No. 4: "The court instructs the jury that where there is a quarrel between two persons, and both are in fault, and as a result of such quarrel a combat takes place, and death ensues, in order to reduce the offense from the degree of murder two things must appear from the evidence and circumstances of the case: (1) That before the mortal wound was given the prisoner declined further combat, and retreated as far as he could with safety; and (2) that he necessarily killed the deceased in order to save his own life, or to protect himself from great bodily harm." Instruction No. 5: Same as last one. Instruction No. 6: "The court instructs the jury that a man shall be taken to intend that which he does, or which is the immediate or necessary consequence of his act; and if the jury believe from the evidence in the case that Rudolph Zeigler, the prisoner, with a deadly weapon in his (prisoner's) possession, without any, or upon very slight, provocation, gave to the deceased, John Sautters, a mortal wound, then said Zeigler, is *prima facie* guilty of wilful, deliberate, and premeditated killing, and throws upon the prisoner the necessity of proving extenuating circumstances, and that unless the prisoner has proved such extenuating circumstances, or such circumstances arise out of the case made by the State, the jury must find the prisoner guilty of murder in the first degree."

The prisoner moved the court to set aside the verdict of the jury, which motion was overruled by the court, and the evidence was certified in a bill of exceptions.

The first error assigned and relied upon by the prisoner is as follows: "(1) It was error not to arrest the judgment and grant him a new trial." The evidence clearly established that the petitioner acted strictly in self-defense, and the homicide was therefore excusable. There was but one witness for

the State whose testimony made out a case of murder or manslaughter, and that was Christian Baurle. Upon the contrary, three other witnesses who were present—the prisoner, his son William, and his wife, Louisa Zeigler—all contradict Baurle, and their testimony tends to establish a case of self-defense, and to show that Baurle and the deceased, Sautters, were the aggressors; that Baurle assaulted Zeigler first, and Sautters followed it up by snapping his musket at him, and then clubbing the gun and striking him, with the butt end, a severe blow, leaving a scar still plainly visible. His evidence is confirmed by Dr. Green, who dressed and probed the petitioner's wound and proves that it was inflicted by some blunt instrument. The State itself introduced a witness (the wife of the deceased) who proved that she distinctly saw something raised up in the air like the butt of a gun. It is plain, therefore, that the jury found against the weight of evidence, and this verdict should have been set aside and a new trial granted.

This assignment of error calls for an investigation of the feeling existing between the prisoner and the deceased, and the immediate circumstances surrounding the parties, at the precise moment when the fatal shot was fired. Trouble existed between the deceased and the prisoner in regard to a road which the prisoner claimed was a private road, and which the deceased claimed was a public road. In pursuance of his claim, prisoner had obtained an injunction restraining the use of said road as a public road. On the day the shooting occurred, the deceased was evidently apprehensive of something which might not only require a witness, but also the use of a gun. He told Baurle he was going to the store, but it must be regarded as an unusual occurrence to carry a musket when merely going to the store. The testimony shows that said Baurle and Sautters had been on the prisoner's premises on the 15th day of July previous, with two other men, all armed with guns, and cut down the bars which Zeigler (the prisoner) had constructed across this road. Sautters called on his friend and neighbor, Baurle, who claimed this road as an outlet from his farm, to accompany him as a witness, saying that prisoner stopped him before, and he would like to have some one go along with him. When deceased, carrying his gun, arrived at prisoner's premises, he found him engaged in hauling out manure. Prisoner and his son came out of his

barnyard, and prisoner told deceased he had an injunction on that road, and that they should not travel it any more. Baurle says he told him, "All right," but heard Sautters say, "It is our road, and we are going to travel it." That Zeigler came up pretty close to him. He stood still. Zeigler stood right in front of him, two or three feet away. Witness told him, "Better stop that;" he did not want to see any bloodshed on this place. That Zeigler struck him first, about his body, with his fist. That he struck back; struck Zeigler on his head; gave him the mark he got on his head. Sautters was four or five steps away. Zeigler's son came up and took hold of witness, and shoved him back on a bank at the side of the road. When witness raised up and turned around, Zeigler shot him in the arm. Witness then turned and ran. Saw Sautters as he passed. He had his gun on his arm. Was doing nothing. It was an old army gun. This only lasted from five to eight seconds. Witness was running away, and did not see the parties when the fatal shot was fired. Saw Zeigler point pistol toward Sautters. Saw no blood on Zeigler's face after he struck him. This is, in substance, the testimony of Baurle, who went with Sautters for the purpose of being a witness.

William Zeigler, who was present, says, as he came out of the barnyard gate, Sautters came up with his gun pointed at his father. That Baurle had both hands in his pockets, but, as Sautters came up, he out with his left hand, and motioned in front of his father, and said, "Hold on, John, we don't shed cold blood;" and his father, facing that way, said, "I neither"—waving his hands outward, and had nothing in his hands. Sautters still advanced until he held his gun within one and one-half feet of his father. Baurle pulled his right hand out of his pocket, and struck witness' father, and witness came around behind Baurle, and pulled him away. Had no more than caught hold of Baurle than Sautters snapped gun-cap. That he got Baurle away from his father after the cap snapped. Sautters raised his gun up and reversed; caught hold of barrel of gun, and struck prisoner over the head with it, and had gun raised to bring it down a second time before prisoner shot. That Baurle got away from witness, and ran into his father, and wheeled him around, and prisoner shot at Baurle, who ran. Sautters stood a little while after he received the first

shot, and was fixing at his gun, as though putting another cap on. He then looked toward his house, and saw Baurle running, and started and ran also until he fell.

The prisoner also gave substantially the same statement as to the manner in which the killing was done; stating that he did not shoot Sautters until he had struck him once with the gun over the head, and was preparing to strike him a second time.

According to Baurle's testimony, the prisoner was pointing his pistol at Sautters without his offering to strike with the gun, and he states that the wound in prisoner's head was caused by his fist; but Dr. Green states that he found prisoner suffering with wound on left side of head, and also one about the ear or temple; thinks it was inflicted by coming in contact with some blunt instrument; wound could have been inflicted by gun, or instrument of that kind. And Mrs. Sautters, the wife of the deceased, who says she went down to the end of the garden, and had a good view, and was near enough to hear what Zeigler said to Baurle about the injunction, and on cross-examination, when asked, "Did you not say, in substance, 'In the mêlée, I distinctly saw a gun in the hands of some one, with butt or breech in the air, overhead of parties'?" answered: "I did say that. I looked since, and saw a locust post that looked just like that." The witness Baurle further testifies that when he ran he saw Zeigler point his pistol toward Sautters, and heard pistol cracks coming closer and closer to him; seeking to create the impression that Sautters was retreating, and the prisoner pursuing him at the time he was wounded. But that theory is at once refuted by the fact that the evidence shows that Sautters was shot in the breast. It is then apparent and manifest that this witness, Baurle, was retreating at full speed at the time the fatal shot was fired. He was not in a position to say whether Sautters clubbed his gun and struck the prisoner over the head with it or not. The prisoner and his son concur in stating that Sautters had struck prisoner over the head with his gun, and was preparing for the second stroke when he received the fatal shot; and it is evident there would have been no necessity for clubbing the gun, had he fired when the cap bursted.

Baurle does not mention the stroke inflicted upon the prisoner with the butt of the gun, but states that the wound in

Zeigler's head was caused by his fist; and, to place the most charitable construction upon this testimony of his, we must say that Baurle did not see or know what transpired after he received his wound and hastily left the battle ground. The fact that the gun was clubbed and used at some time during the combat does not rest alone upon the testimony of the prisoner and his son, but the wife of the deceased states that she saw the gun brandished above the heads of the combatants; and, unless it was done after Baurle retreated, it is clear that he suppressed a very material and important fact, in delivering his testimony. That the butt of the gun was used upon the head of the prisoner appears from the fact that the prisoner had a contusion on his forehead near his eye, and congestion of the eye, which was evidently the result of the blow received from the fist of Baurle, while Dr. Green, who examined the prisoner's wounds, says he had one wound on the left side of the head, and also one about the ear or temple, and that the wound was inflicted by some blunt instrument, and could have been inflicted by a gun, or instrument of that kind. Again, Sautters had not been shot when Baurle passed him, running away. Two things then must have transpired in a brief space of time after Baurle passed. The gun was brandished, and Zeigler received the blow, and the fatal shot was fired while Sautters was facing the prisoner, because he received the wound in front, as shown by the testimony of Dr. Ross. Zeigler received the blow from the gun on the left side of his head, as it would naturally be dealt by a right-handed man, facing his adversary. Sautters received the fatal shot immediately after Baurle passed him, for the evidence shows that he followed Baurle and fell in the road, only thirty yards behind him.

This was the case presented to the jury by those who were present and had an opportunity of seeing what transpired. In addition to this, Mrs. Sautters, the wife of deceased, states that she heard the prisoner tell Baurle "they shouldn't travel that road, and said something about injunction." She also states that prisoner, after firing the first shot, fired two more shots at Baurle as he ran. Now, there can be no question from the testimony that bad feeling existed between the prisoner and the deceased. It appears from the testimony of Isaac Holton: That he was invited to go to Zeigler's,

and was told that Baurle and Sautters were going to open this road. It was then obstructed by bars. That he went, and Sautters and Baurle had guns. Zeigler was engaged in hauling hay. That Charles Butte cut the bars down, and he and Zeigler came together in fighting attitude, and Charles Butte pushed or knocked him down. That Zeigler picked up two rocks, and witness told him not to do that—he might get hurt, or hurt somebody—and he threw the stones down and went into his barnyard. Subsequent to that time, the record discloses that repeated threats were made by Zeigler and Sautters on account of the feeling existing in regard to this road. Zeigler appealed to the law for protection and obtained the injunction, of which he gave Sautters notice at the time he approached, on the day the shooting occurred.

The testimony in the case discloses the deadly hostility entertained by the deceased, Sautters, toward Zeigler. He told Simon Barsore that Zeigler stopped him in the road one time, and “if he’d stop him again he would kill him.” Emma Young heard him say he was going to load his gun heavy with buckshot, and be ready for Zeigler. He said to W. H. Poole, “Let that ole booger stop me on that road, and right there is where he kills me, or I kill him.” On the day of this fatal occurrence the deceased approached Zeigler (who was at his own home, engaged in his farming operations), carrying his loaded musket, ready cocked, and pointed directly at him. During the struggle between Baurle and the prisoner deceased displayed his deadly intent by bursting the cap of his gun at him; and, after the prisoner had received a heavy stroke from the fist of Baurle, it was followed by a crushing blow on the head from the breech of the gun, and the deceased was preparing to follow it up with another. And it occurs to me that, if Zeigler wished anything left in the shape of self to defend, the time for action had arrived. It is true, he was carrying a revolver, and, thinking the occasion had arrived when it might be used, he used it with deadly effect; and while it is also true that our statute prescribed a severe penalty for carrying a pistol, yet it expressly excepts from such penalty a person who carries such weapon about his dwelling house or premises. In Whart., Hom., under the head of “Excuse and Justification” (section 480, note 6), the definition of “justifiable homicide” is stated thus (quoted from the opinion

of Chapman, C. J., in the case of *Com. v. Andrews*): "There is still another definition that needs to be given to you, namely, what constitutes justifiable homicide; for a question may arise here in regard to that subject. It rests upon the right of self-defense. The law regards it as a sacred right, and every man's heart justifies the principle. If an assault is made upon a man, with an attempt to commit a felony upon him, he may resist, so far as it is necessary to resist, the assailant, even if he must take the assailant's life. But this has a limitation. If he can resist the assault and free himself without taking life, and kills the assailant without necessity, he is not excusable. If mere heat of blood impels him to take life, in such a case he is guilty of manslaughter."

And in section 8 of the same work the author says: "*Se defendendo*, or in self-defense, which exists where one is suddenly assaulted, and in the defense of his person, where immediate and great bodily harm would be the apparent consequence of waiting for the assistance of the law, and there is no other probable means of escape, he kills the assailant. To reduce homicide in self-defense to this degree, it must be shown that the slayer was clearly pressed by the other party, and retreated as far as he conveniently or safely could, in good faith, with the honest intent to avoid the violence of the assault." The law never intended, however, that in the circumstances of this case it was the duty of Rudolph Zeigler, the prisoner, to run away from his home, or hide himself, when the deceased (Sautters), accompanied by his friend and witness, came with their guns to force their way through this road. They were warned of the existence of the injunction by Zeigler; and, after the difficulty commenced between Zeigler and Baurle, it must be remembered that the entire combat only lasted, according to the testimony, from five to eight seconds. During that period Zeigler had received a heavy blow on the head from the fist of Baurle, which, according to Baurle's testimony, knocked Zeigler away from him, and turned him around. Baurle had been pulled away and thrown back by William Zeigler (the son), and had rushed again at Zeigler, and received the shot in the elbow, and started to run. Zeigler fired two shots in quick succession after Baurle; and, Sautters' gun having failed to shoot, he clubbed his gun, and struck Zeigler over the head, and was raising it for a second stroke when Zeigler

fired the fatal shot. Now, if we put ourselves in the place of Zeigler for the few seconds that this combat lasted, and consider that Baurle says he "don't know how hard he struck, and whether he struck once or twice;" who states that he is a coward, "and if he strikes a man he strikes him good;" staggered and blinded by this blow on the eye and forehead, he receives the crushing blow from the butt of the musket in the hands of Sautters—we may well infer that the fierceness of the assault from these two men was such as to preclude all possibility of retreat with any degree of safety, even if sufficient strength was spared him by these paralyzing strokes.

In the case of *State v. Cuin*, 20 W. Va. 680, this court stated the law as follows: "Where one, without fault himself, is attacked by another in such a manner or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, and the person assaulted has reasonable grounds to believe and does believe such danger is imminent, he may act upon such appearances, and, without retreating, kill his assailant, if he has reasonable grounds to believe that such killing is necessary in order to avoid the apparent danger; and the killing under such circumstances is excusable, although it may afterwards turn out that the appearances were false, and that there was in fact neither design to do him some serious injury, nor danger that it would be done. But of all this the jury must judge from all the evidence and circumstances of the case." It is proper just here to call attention to the fact that the prisoner had actually made no demonstration of any kind whatever towards the deceased until after he snapped his gun at him, and after he received the blow on his head with the breech of the gun. Before that his entire attention appears to have been occupied with Baurle. Bishop, in his work on Criminal Law (volume 1, § 865), states the rule thus: "If one who is assaulted (we have seen that there must be an overt act rendering the danger imminent), being himself without fault in bringing on the difficulty, reasonably apprehends death or great bodily harm to himself unless he kills the assailant, the killing is justifiable." Now, that the deceased started from his home with his loaded gun, with the deliberate intention of carrying out his previous

threats by killing the prisoner if he came out to him in that road, is manifest from his subsequent actions. That Baurle knew what his intention was is shown by his language when Sautters first pointed his gun at the prisoner—"John, hold on; don't shed cold blood;" by his snapping his gun at prisoner while engaged in combat with Baurle; by clubbing his musket and attacking prisoner before he had recovered from the stunning blow received from Baurle. Turning to the conduct of prisoner, we find that although the deceased, Sautters, came towards him in this threatening attitude, with his gun pointed and hand about the lock, nothing in the entire testimony shows that the prisoner made any demonstration towards the deceased until after he received the blow from the musket. True, Baurle, who came there as a witness, says, as he ran, he saw the prisoner point his pistol towards deceased; but that is met and refuted by the fact shown that Baurle was running towards, and passing by, Sautters; was wounded and frightened himself; and the prisoner fired two shots after him after he commenced running. In this connection we may ask, what is the law, as settled in this state, where self-defense or other justification is set up? Haymond, P., in the case of *State v. Abbott*, 8 W. Va. 766, in delivering the opinion of the court, said: "If the circumstances and evidence tend to prove self-defense, or other legal justification, then, as to the question of whether the act was done in self-defense or other legal justification, if, in the opinion of the jury, a substantial conflict of circumstances or other evidence exists, there should be such a preponderance of circumstances or other evidence against the self-defense or other justification as to reasonably satisfy the mind of the jury that the killing was not in self-defense, or justifiable, before they can convict.

If there be, in the opinion of the jury, a substantial conflict of the evidence or circumstances as to whether the killing was done in self-defense, and the circumstances or other evidence preponderates in favor of self-defense, and, I should add, if it was equally balanced as to the killing being done in self-defense, the jury ought not to convict of either murder or manslaughter." This court, however, in a later case (*State v. Jones*, 20 W. Va. 764), held that, "upon a trial for shooting with intent to kill, the use of a deadly weapon being proved, and the prisoner relies upon self-defense to excuse him for the use

of the weapon, the burden of showing such excuse is on the prisoner; and, to avail him, he must prove such defense by a preponderance of evidence." It is true that the courts in this state, and the old state, have guarded with jealous care the province of the jury in criminal trials, and have declared more than once their aversion to interference with verdicts, and have announced that, although they might have rendered a different verdict if they had been upon the jury, yet they ought not to interfere. Still, we find, in the case of *Hill v. Commonwealth*, 2 Grat. 595, it was held that "this court will only set aside a verdict because it is contrary to the evidence in a case where the jury have plainly decided against the evidence, or without evidence;" and in the case of *Grayson v. Commonwealth*, 6 Grat. 712, the law was thus stated: "A new trial will be granted when the verdict is against law, or where it is contrary to the evidence, or where the verdict is without evidence;" and in Foster's case, 21 W. Va. 767, it is held that "where the court which tried the cause certified all the facts proved on the trial, and from the facts so certified it clearly appears that they were wholly insufficient to sustain the verdict, this court will set the verdict aside, and, in a proper case, award a new trial." The facts and circumstances developed by the testimony in this case are such as, in my opinion, made out a case of self-defense. The fierceness of the assault made upon the prisoner with the musket immediately after he had received the stunning blow from the fist of Baurle, was such as to admit of no retreat with safety, and nothing was left him, to save his own life or prevent great bodily harm, but to use his weapon; and I think the jury should have so found, and the court, on motion, should have set the verdict aside.

The next assignment of error is as to the action of the court in excluding the testimony of Conrad Potter as to threats made by Baurle against the prisoner. These threats, whether communicated to the prisoner or not, were admissible to show the prejudice and state of mental feeling on the part of the witness towards the prisoner, and should not have been excluded; and the same may be said in reference to the evidence offered in regard to the feeling of the witness Lutman, which was excluded by the court.

The fourth assignment of error is as to the exclusion of the

testimony of John Johnson as to threats made by the deceased against the prisoner, that he would kill him if he came out to him on that road. It is true that the witness did not mention Zeigler's name in that conversation, but he was talking about this road, and it was well understood what he intended. This threat does not appear to have been communicated to Zeigler; but threats of Sautter had been shown, and it should have been allowed to go to the jury, in connection with the subsequent acts of the deceased, to show that his going to Zeigler's with his loaded gun was in pursuance of a previously formed design.

The sixth assignment of error is as to the action of the court in excluding the testimony of George Shriver, who, after testifying as to his being road surveyor, and about some conversation with the prisoner as to whether the road in controversy was a public road, was asked, on cross-examination, if the deceased cut down the bars of Zeigler on said road; and the court ruled that, if the defense wished to ask any questions about other conversations, they would have to make him their witness. And, while I think the question would have been proper, if asked in chief, I think it was properly excluded on cross-examination.

The sixth and seventh assignments of error, I think, were well taken. The first relates to the contradiction of the witness W. E. Butts in a material matter, where the foundation had been properly laid; and the second rests upon the same ground.

The eighth assignment of error relates to the action of the court upon the instructions asked for—in refusing all of the instructions asked for by the prisoner, and giving all save one asked for by the state. The first instruction asked for by the prisoner was properly rejected, as it fails to state the law as laid down in the case of *State v. Jones*, 20 Grat. 764. The second instruction prayed by the defendant was properly refused, as I do not think it states the law correctly. Whart., Hom., § 414, states the law upon that point thus: "A bare trespass against the property of another, not his dwelling house, is not sufficient provocation to warrant the owner in using a deadly weapon in its defense; and if he do, and with it kill the trespasser, it will be murder, and this though the killing were actually necessary to prevent the trespass."

The Circuit Court committed no error in rejecting instructions Nos. 3 and 4, prayed for by the prisoner, for the reason that they are not sufficiently qualified by stating, as was stated in Cain's case, in the instruction given by the court upon this question, in instruction No. 1 for the defendant, "When one, without fault himself, is attacked," etc. Instructions 3 and 4 should have contained this qualification, and instructions Nos. 1 and 2, given for the defense by the court, not only contained this qualification, but embodied all that was asked for by the prisoner in said instructions Nos. 3 and 4. It is true, this court held in *State v. Evans*, 33 W. Va. 418, that "a party has a right to have his instructions given in his own language, provided there are facts in evidence to support it; that it contains a correct statement of the law, and is not vague, irrelevant, obscure, ambiguous, or calculated to mislead." But, unless they state the law correctly, they should be rejected. For the foregoing reasons the judgment complained of must be reversed, the verdict set aside, a new trial awarded, and the cause remanded.

BRANNON, J. I doubt whether, under the rule of practice in this court, we should express any opinion upon the evidence, as the case must be retried for other reasons than that arising under the motion for a new trial under the evidence.

NOTE.—*Mutual combat does not necessarily deprive party of right of self-defense.*—If two persons mutually agree to go out and fight "a fair fight" without weapons, and if, on reaching the place of combat, they both abandon their first intention, and mutually agree to fight, and do fight, with deadly weapons, and one slays the other, he is guilty of manslaughter, at least. But if, on reaching the place of combat, one only of the parties abandons the original intention, and manifests a purpose to fight with a deadly weapon, and, in pursuance of that purpose, advances upon and attacks the other with such a weapon, and the latter, not intending to enter into the other's purpose to have a mortal combat with deadly weapons, but really and in good faith endeavoring to decline engaging in such a combat, simply retreats, or stands upon his defense, and, in order to save his own life or to prevent the perpetration of a felony upon him, of necessity slays his adversary, he is guilty of no offense, but is justifiable in law. *Barton v. State*, 96 Ga. 435.

Instruction.—*When life of assailant may be taken.*—An instruction that life can be taken only in resisting "an assault threatening, imperiling life," is erroneous, as there need not be an actual peril existing; it is enough that the circumstances are such as to create a reasonable belief, and that the party does believe, he is in imminent peril of life or limb. *Thomas v. State*, 80 Fla. 109.

Self-defense.—Deceased was killed by a stone alleged to have been thrown by defendant. Defendant testified that deceased's attack upon him was unprovoked and violent, that he advanced upon defendant as the latter was retreating, and that defendant thought deceased was going to hit him; but he also claimed that a third person threw the stone. *Held*, that there was no error in instructing as to self-defense, though defendant objected. *Reed v. State*, 141 Ind. 116.

An instruction that defendant is entitled to an acquittal if he was assaulted by deceased in such a manner as to cause him to believe, and he did believe, that he was in imminent danger of his life or suffering great bodily harm, and he killed deceased while so believing, is substantially correct. *Deilkes v. State*, 141 Ind. 23.

An instruction that, if an act be perpetrated with a deadly weapon so used as to be likely to produce death, the purpose to kill may be inferred therefrom, is not erroneous. *Id.*

An instruction on the law of self-defense, which is misleading in not being sufficiently definite, and invades the province of the jury, is properly refused. *Id.*

A question to defendant as to whether he believed he was in danger of great bodily harm, from what he knew of the character of deceased, and from the nature of the assault upon him by deceased, was properly excluded. *Id.*

A conviction of manslaughter will not be disturbed as not being sustained by sufficient evidence where the evidence is conflicting, and there is testimony sustaining every material allegation in the indictment. *Id.*

Self-defense.—In the absence of exceptional circumstances, a person is not justified in repelling a blow with the fist by stabbing his assailant. *Smith v. State*, 143 Ind. 685.

Where defendant, in a fight with deceased, drew a pistol and shot him, the court properly refused to charge that, to deprive defendant of the right of self-defense he must have procured the pistol with intent to bring on the difficulty, and use it therein in overcoming or slaying deceased, if necessary, it being enough that defendant intended to use the weapon in inflicting great bodily harm upon deceased or in committing a felony. *Hunt v. State*, 72 Miss. 413.

Defendant shot deceased in a fight. The court charged that defendant had no right of self-defense if he procured the pistol with a view of bringing on the difficulty, or if he got it "to be used in the fight," or in any way in overcoming deceased in committing any felony or in injuring him, however slightly. *Held* that, though the charges were incorrect, there was no reversible error. *Id.*

Defendant went to deceased's house at night to beat him, and in the fight shot him, but there was evidence that defendant was retreating when he shot. The court charged that if defendant armed himself with a deadly weapon, and went to deceased's house at night to do "some" unlawful act, and provoked a difficulty in which he killed deceased, it was murder, though at the time of the shooting deceased was striking defendant with a hoe or other deadly weapon. *Held*, that the charge was erroneous, as imposing no limit upon the character of the unlawful act, and as omitting reference to defendant's having abandoned the contest. *Id.*

A charge that, in order to justify a homicide on the ground of self-defense,

a person endangered or assailed must employ all reasonable means within his power, consistent with his safety, to avoid the danger, and avert the necessity of taking life; he must even retreat, if retreat be safe and practicable, is erroneous. *Page v. State*, 141 Ind. 236.

(Crown Case Reserved.)

REG. V. MUNSLow.

(18 Cox's Criminal Law Cases, 112.)

DEFAMATORY LIBEL—*Practice—Indictment—Necessary averment—Inference of law—Allegation of malice.*

1. It is not necessary to allege in an indictment facts which the law will necessarily infer from the proof of other facts which are alleged.
2. An indictment for defamatory libel omitted to allege that the libel was published maliciously. *Held*, that the indictment was nevertheless good, inasmuch as upon proof of the publication of the libel the legal inference, until rebutted by the defendant, was that it was published maliciously, and the allegation that the publication was malicious was not therefore a necessary averment.

Before LORD RUSSELL, C. J., POLLOCK, B., WILLS, CHARLES and LAWRENCE, JJ.

Case stated by CAVE, J., as follows:

1. George Munslow was tried before me at the last assizes at Warwick on an indictment for libel under Sect. 5 of 6 and 7 Vict., c. 96.

2. The indictment contained three counts, each setting out a separate libel. The language of each count, so far as it affects the question of law raised before me, was identical, and for the purpose of the present case it is only necessary to set out the material words of the first count, which were as follows: "The jurors for our Lady the Queen upon their oath present that George Munslow unlawfully did write and publish a certain defamatory libel of and concerning Henry Trulove, according to the tenor and effect following, that is to say:" * * * (Here follow the specific words of the particular libel complained of.)

3. The prisoner pleaded not guilty, whereupon counsel on his behalf applied to me to quash the indictment on the ground

that it did not contain any averment that the prisoner published the libels or any of them maliciously, and did not therefore sufficiently disclose any offence under the aforesaid section.

4. I refused this application and allowed the case to proceed, and the prisoner having been convicted on all the counts, his counsel raised the same question by way of motion in arrest of judgment. I thereupon postponed sentence, and took bail for the prisoner to come up for judgment if called upon at the next assizes and consented to state a case for the consideration of this court.

The question for the opinion of the court is whether judgment ought to be arrested on the ground taken by the prisoner's counsel. 6 and 7 Vict. c. 96, s. 5 enacts that:

If any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment, or both, as the court may award, such imprisonment not to exceed the term of one year.

Stanger, on behalf of the prisoner, submitted that it was essential to support the conviction that the publication of the libel should have been found to be malicious, and that it was therefore necessary to aver in the indictment that the libel was published maliciously. Although the law will infer malice in many cases, it may be that the circumstances proved by the prosecution may show, or that the prisoner may prove, the publication to have been privileged, in which case evidence of express malice would be required, and it followed must be alleged in the indictment. In *Reg. v. Harvey* (1 C. C. R. 284), it was held that, where it was an offence to do a thing "without lawful authority or excuse," the proof of such authority or excuse lying on the person accused, it was necessary to negative lawful authority or excuse in the indictment nevertheless. Further, it is a question of fact whether or not a publication was malicious, and it was clear that the allegation that the libel was published "unlawfully" would not supply the allegation that it was published "maliciously;" and if the latter allegation was essential to the validity of the indictment its omission could not be cured by the verdict. In *Emmons v. Pottle and another* (16 Q. B. Div. 354), Lord Esher, M. R., seems to have considered that it was for the jury to find whether the defendant then knew that the paper contained a

libel, which was in effect leaving it to the jury to find malice. Even assuming that the averment was necessary, its omission was not cured by the verdict of the jury, inasmuch as the rule as to the curing of imperfectly-stated averments by the verdict is not applicable to the case of total omission of an essential averment. See Brett, J. A., in *Reg. v. Aspinall* (36 L. T. Rep. 297; 2 Q. B. Div. 48; 13 Cox C. C. 563; 46 L. J. 145, M. C.) In *Reg. v. Ryan* (2 Moo. C. C. 15), it was held that the omission of the word "unlawfully" rendered an indictment under 9 Geo. 4, c. 31, s. 12, bad, although the word "maliciously" was used; and *Rex v. Turner* (1 Moo. C. C. 239), was a similar decision. The present indictment was founded upon the statute, and in *Rex v. Cox* (1 Leach C. C. 71), the court held that, where the word "wilful," was used in the statute creating the offence it was necessary to aver in the indictment that the offence was committed wilfully; so also in *Rex v. Davis* (Ib. 493), an indictment under the Black Act was held bad for omitting to charge the shooting to have been done "wilfully and maliciously" as well as feloniously. If the description in the statute merely described the common law offence of libel, it would not create any new offence; but if it described something different, as it was submitted it did, then the statute created a new offence, and the offence being alleged *contra formam* statute, it was necessary that it should be charged in the words of the statute.

Hugo Young, in support of the conviction, submitted that even if the indictment, being founded upon the statute, should have alleged that the libel was published maliciously, yet in *Reg. v. Boale* (21 Q. B. Div. 284), it was held, that on an indictment for publishing a defamatory libel, "knowing the same to be false," the defendant may be convicted of the common law offence of publishing a defamatory libel. The averment was one which was necessarily involved in the verdict, and was therefore cured, according to the rule in *Heyman v. The Queen* (23 L. T. Rep. 8 Q. B. 102; 12 Cox C. C. 333). It was further submitted that the allegation of malice was unnecessary to the validity of the indictment, inasmuch as the law inferred from the mere publication of a defamatory libel that it was published maliciously; and it was therefore unnecessary to aver that which the law would necessarily infer from the averments that were made. (*Werceer v. Sparks*, referred to in

Viner's Abr., followed in *Bromage v. Prosser*, 4 B. & C. 247, at p. 255.)

Stanger, in reply.

LORD RUSSELL, C. J. This is a case in arrest of judgment, and the matter comes before us upon a case stated by my learned brother Cave, who presided at the trial of an indictment charging the defendant with libel. The indictment contained three counts and the language of those counts for the purposes we have to consider to-day, may be taken to be identical. They stated that the defendant "unlawfully did write and publish a certain defamatory libel of and concerning Harry Truelove, according to the tenor and effect following," and the indictment then proceeds to set out the libel complained of. It will therefore be seen to have omitted the word usually found in such an indictment, namely, "maliciously." Speaking for myself, it is deplorable that the law admits of its being possible to raise such an objection as the present, and that the existing law does not admit of such an omission being then and there supplied by the judge at the trial. The point was, however, taken that the indictment was bad, and the substantial question we have to determine is, was the indictment bad? The case was intended to be presented by the prosecution as coming within Sect. 5 of 6 and 7 Vict., c. 96, and undoubtedly it is clear that the case was presented to the jury as a case coming within that section. Now, what is the effect of coming within that section? It provides that, if any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment, or both, as the court may award. It therefore does not, so far as its language is concerned, disclose the creation of any new offence, nor does it purport to be a definition of an existing offence. It is merely an application, to that which is an offence at common law, of the punishment which is to take place upon a conviction for the common law offence. Therefore all the line of cases referred to by the learned counsel in his able argument on behalf of the defendant, which relate to offences created by statute, have no bearing upon the present case. Why was it that the word "maliciously" was introduced? It is obvi-

ously necessary that it should have been introduced, for if it had not it would have worked a great deal of injustice, for any one who publishes defamatory matter of another is guilty of publishing a libel. The word "maliciously" is introduced in order to convey that although a man would be *prima facie* liable for publishing a defamatory libel, yet he can rebut that by displacing the presumption that the publication was malicious. The judge at the trial has to direct the jury whether it is capable of being treated as a defamatory libel, and there his functions end. The common law attaches to the mere fact of publication that it was malicious.

But the defendant may be able to show that though it was in fact a defamatory libel, yet it was published upon a privileged occasion, or that it was true and published for the public benefit. That class of cases was excluded by the use of the word "maliciously." We must follow it out clearly. The case goes to the jury, and it must be assumed that the libel was capable of the innuendoes put upon it, and that the jury found that it was in fact a libel, and that there was no justification for its publication. The question arises in that state of things whether the conviction is one which is to be quashed merely because the word "maliciously" was omitted in the indictment. The argument is, in effect, that this was an indictment under the statute, and for an offence under the statute. But in my judgment, that is a mistake. It was an indictment for the common law offence, but one which was so framed as to bring it within the section. Then, is an indictment which merely omits the word "maliciously" a bad indictment? It is common ground that the practice in both civil and criminal cases is the same. Then if, in civil cases, a declaration for a defamatory libel would be good on demurrer which omitted that word, an indictment would also be good. No doubt the law implies malice from the publication of defamatory matter. Now, how stand the authorities? The first case is *Rex v. Harvey*, decided in 1823 (2 B. & C. 256). That is a case in which the defendants were indicted for a libel imputing to George IV. mental insanity, and although the point did not arise, the language used by the learned judges, upon motion being made for a new trial, throws an important light on the question. The jury, after being dismissed, wished to know if it was necessary that there should be a malicious intention to

constitute a libel, and Abbott, C. J., replied that, "The man who publishes slanderous matter, in its nature calculated to defame and vilify another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can show the contrary; and it is for him to show the contrary." Upon the new trial, motion coming on, Bayley, J., on page 263, says:

"It is considered that to state falsely of his majesty that which is stated in this publication is a libel. If it be not so, the objection will be upon the record, and may be taken advantage of either upon writ of error or by a motion in arrest of judgment. But, as at present advised, I am of opinion that falsely making that assertion was evidence that the party made it maliciously." Then, again on p. 264, he repeats the same proposition. Holroyd, J., is more direct on the necessity for the allegation of the malice. He says: "Now, if a thing in itself mischievous to the public be wrongfully done, that is an indictable offence. It is not necessary to aver in such an indictment any direct malice, because the doing of such an act without any excuse is indictable." Again, on p. 267, he says: "If the matter published was in itself mischievous to the public, the very act of publishing is *prima facie* evidence to show that it was done *malo animo*; for when a publication having such an injurious tendency is proved, it is intended to have been done with a malicious intention; because the principle of the law is, that a party must always be taken to intend those things and those effects which naturally grow out of the act. If, therefore, the effect naturally flowing from the act of publishing the libellous matter in this case was mischievous to the public it follows that the judge was bound to tell the jury that malice was, by law, to be inferred, and so forth. I would only observe that the words "prove at the trial" must be used in the sense that the learned counsel for the defendant used them, that it is necessary to prove it in the sense that the facts from which the law will infer malice must be proved. That case was followed by the case of *Bromage and another v. Prosser* (4 B. & C. 247), decided in 1825, an action for slander; but on the point we are considering no difference exists between that and the present case. Bayley, J., in that case said:

"If in an ordinary case of slander (not a case of privileged

communication) want of malice is a question of fact for the consideration of the jury, the direction was right; but if in such case the law implies such malice as is necessary to maintain the action, it is the duty of the judge to withdraw the question of malice from the consideration of the jury; and it appears to us that the direction in this case was wrong." A little later on he says: "Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse." This is so laid down in *Mercer v. Sparks*, which is reported in Noye's Rep., p. 35, and also in Owen's Rep., at p. 51. Those are the authorities, and the last case that it is necessary to refer to is *Heyman v. The Queen* (28 L. T. 162; L. Rep. 8 Q. B. 102; 12 Cox. C. C. 383), where it is clearly laid down that there is no difference in the principle applicable in civil and in criminal pleadings that defective allegations contained therein are corrected by the verdict. The general principles in civil and in criminal proceedings are substantially the same. I come, therefore, to the conclusion that this indictment is good, and that it would be monstrous if it could not be so held. To go further, the indictment begins with a statement that the libel was published unlawfully, and, considering the question as we are now doing after the verdict of the jury, even as an imperfect averment, I think that such imperfection would be cured by the verdict. I do not base my judgment upon that ground, however, but on the ground that the indictment is good, notwithstanding the omission of the word "maliciously;" that it is not an indictment under the statute, but that the statute is merely an enjoining of what punishment is to follow upon a conviction for the common law offence. On these grounds I think that the conviction must stand.

POLLOCK, B. I concur in thinking that this conviction is good upon the ground that the indictment is good in law. My Lord has pointed out very clearly that this is not an indictment founded upon any particular section of an act of parliament, and we have only to bear in mind that the rules which are applicable to cases of libel are the same, both in civil and criminal proceedings.

It may be generally observed that, where an action will lie for that which is a libel, an indictment may charge the document in question as a libel, and where that is so the person

who publishes that libel brings himself within the criminal law without its being necessary to show any malice. That has been followed out by all the authorities. As early as the time of Elizabeth we find a case in which it was held that where words are scandalous they are, *eo ipso*, malicious, and it is therefore unnecessary in an action to allege that they were spoken maliciously (Vin. Abr. 533). In *Haire v. Wilson* (9 B. & C. 645), where the learned judge who tried the case directed the jury to find for the plaintiff if they thought the defendant intended to injure him by publishing the libel in question, otherwise for the defendant; and Lord Tenterden, C. J., commenting on that when the case came before the court of king's bench, said this: "The judge ought not to have left it as a question to the jury, whether the defendant intended to injure the plaintiff, for every man must be presumed to intend the natural and ordinary consequences of his own act. If the judge thought the tendency of the publication injurious to the plaintiff, he ought to have told the jury it was actionable, and that the plaintiff was entitled to a verdict. That was the view adopted and enforced in *Bromage v. Prosser* (4 B. & C. 247), and some of the other cases. Can it then be said that an indictment must aver that which is an inference of law? It is unnecessary to cite any other cases to show that this is not so. For myself, I think that where sufficient facts are proved, it is for the judge to make a statement that the jury are to infer that there was malice, unless they are satisfied from the facts that the publication was not malicious. I think that this indictment is good, and that the conviction must therefore be confirmed.

WILLS, J. I am of the same opinion, and am not sorry that the question has been seriously discussed. It is of considerable importance in criminal matters that the offence should be stated in clear and legal language, so that looseness of thought, which creeps into the consideration of civil cases, should be provided against as much as possible.

The expression libel and the expression publication exclude, in my opinion, what the books sometimes call accidental publication, because, as I understand the case of *Emmens v. Pottle* (*ubi sup.*), that which is called an accidental publication is no publication at all. In Lord Abingdon's case (1 Esp. 225), Lord Kenyon treats it as a case of inadvertent publication.

But Lord Esher's view in *Emmens v. Pottle* is, to my mind, more technically correct; but, which ever you follow, the notion of its being necessary to prove that the publication was malicious, is excluded. It seems to me that every case is excluded in which the law would not necessarily attach the epithet of malice to the publication of the document. If that is so, the allegation of malice can not be less effectively made by not being expressly alleged. If the inference is inevitable, it is sufficient, and I therefore think that this conviction is good.

CHARLES, J. I am also of opinion that this indictment was good, and I have nothing to add to the reasons given by my Lord and my learned brothers. For myself, I may add that I am of opinion that, even if the indictment was bad, its insufficiency has been entirely cured by the verdict.

LAWRENCE, J. I entirely agree.
Conviction affirmed.

NOTE.—*What constitutes libel per se.*—A case of much importance and considerable novelty has been recently decided by the Supreme Court of Minnesota (*Peterson v. Western Union Tel. Co.*, 1 Chicago Law Journal Weekly, 375). The suit was instituted by the plaintiff against the defendant to recover damages for defamation of character, under the following circumstances:

It would seem that the plaintiff was an aspirant or candidate for political honors, and the defendant, on January 19, 1893, received at its office in New Ulm, from Albert Blanchard, a message for transmission over its telegraph line to St. Paul, which reads thus: "New Ulm, Minn., 1-19, 1893. To S. D. Peterson, Care Windsor, St. Paul, Minn.: Slippery Sam, your name is pants. [Signed] Many Republicans." The New Ulm operator sent the message over the wires to St. Paul, where it was taken from the wire by the operator, and delivered to the plaintiff in a sealed envelope bearing his address as stated in the message.

The plaintiff recovered a verdict for \$5,200, upon which the trial court entered a judgment, which was reversed by the supreme court because it was excessive. The court, however, held that the message was libelous *per se*, which necessarily implies that the person publishing the same would be amenable to punishment under the statute. "The sting is in the word 'slippery,'" says the court. This word, when used as descriptive of a person, has a well understood meaning. It means, when so used, that the person to whom it is applied can not be depended on or trusted; that he is dishonest, and apt to play one false. Cent. Dict. If such is the meaning of the word as used in this message—and of this the jury were the judges—it was clearly libelous, because, if a man is dishonest, and apt to play one

false, he merits the scorn and contempt of all honorable men. To falsely publish of a man that he is slippery, tends to render him odious and contemptible. Such a publication is a libel. *Wilkes v. Shields*, 62 Minn. 426.

To charge that a man is an ex-convict, is libelous *per se*. *Morrissey v. Peo. Tel. Co.*, 32 Atl. 19.

Responsibility of newspaper publisher.—It is no defense to indictment for libel against the publisher of a newspaper to show that the article was published without his consent and knowledge, unless it further appear that the publication did not occur through any negligence or want of ordinary care on his part. *State v. Mason*, 38 Pac. (Ore.) 138. The publisher gives his agents the power to publish articles, and if through his want of care, libelous articles are published, he should be held criminally liable. *Id.*

Also *Com. v. Morgan*, 107 Mass. 199.

JANZEN v. THE PEOPLE.

(159 Ill. 440.)

RAPE: Evidence in prosecution for rape—Controlling application of improper testimony.

The admission, on the trial of a father for rape upon his daughter, of evidence that he also committed a rape upon another daughter, is reversible error, although the court attempts to confine its application to the question why the latter daughter left home and to the contradiction of defendant's testimony.

Writ of Error to the Circuit Court of Stephenson County; the Hon. James Shaw, Judge presiding.

William M. Snyder, William N. Cronkrite, and Horatio C. Burchard, for plaintiff in error.

Maurice T. Moloney, Attorney General (*T. J. Scofield, M. L. Newell, Samuel Richolson and George Bacon*, of counsel,) and *Oscar E. Heard*, State's Attorney, for the People.

MR. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

This was an indictment in the Circuit Court of Stephenson County, against Ebbert Janzen, plaintiff in error, for rape, alleged to have been committed on or about the first day of May, 1894, upon the person of his daughter, Mary Janzen, who at the time the offense was committed was under the age of four-

teen years. On a trial before a jury the defendant was found guilty as charged in the indictment, and his term of imprisonment was fixed at six years in the penitentiary. The court overruled a motion for a new trial and entered judgment on the verdict, to reverse which the defendant sued out this writ of error.

It is first claimed by counsel for plaintiff in error that the court erred in the admission of improper evidence, and under this head it is said the prosecution was permitted to introduce evidence that another offense was committed by the defendant on the person of another daughter subsequently to the one charged in the indictment. Upon looking into the record it appears that Yetta Janzen, a sister of the prosecuting witness, was called and testified in behalf of the People, and from her evidence it appeared that she had been absent from home about three years, living with a family named Clipping, who resided some five miles from the defendant. Upon cross-examination of the witness the following occurred: Counsel for defense stated that he desired to show that the witness had become displeased with her father because she did not have as good a home with him as she had at Clipping's.

The Court: "You may show that briefly, but not go into details.

Q. "You did not want to stay at home, did you, Yetta? A. "No, sir.

Q. "Did your father want you to stay at home? A. "Yes, sir."

After this evidence was called out by the defendant, the court, over the objection of the defendant, permitted the witness, on behalf of the People, to testify as follows: "He tried to use me in a bad way in bed. First he was in another bed and afterwards he came into my bed. The boys and Mary were out doors. This was about five o'clock in the morning. After he got into bed he took hold of my arms and got on top of me. He unbuttoned my drawers and put his private parts between my legs. I hollered, 'Ouch.' I hollered more than once—not very loud. When I got up and went out doors I found half a dozen men there." This evidence was admitted, as stated by the court, for the purpose of showing why the witness, Yetta, left home, and the jury were told by the court that the evidence was not admissible for the purpose of show-

ing that defendant had committed a crime on Yetta, and they would not consider it for that purpose.

The defendant testified as a witness in his own behalf, and on cross-examination admitted that he was in bed with Yetta on the morning of May 15—the day he was arrested—but he testified that he did nothing to the girl, and in rebuttal the court, over the objection of the defendant, permitted three witnesses to testify that on the morning of May 15 they were in the defendant's home and saw him in bed with Yetta Janzen, in the act of having criminal sexual intercourse with her. This evidence was admitted by the court, as stated at the time, on the following ground: "I wish to state that this evidence is admitted because the defendant, in his examination, testified that he had gone into this room and got into the bed with this girl, but had done nothing else. If it was material and competent for him to testify as to that matter I think it is proper that the prosecution should be permitted to contradict it, and for that purpose I admit it in evidence, and the jury will understand that they are not hearing it for the purpose of trying this defendant for any crime committed on Yetta, but simply for the purpose of contradicting his own testimony."

If the evidence of the girl, Yetta, and of the three other witnesses, in regard to what occurred on the morning of May 15, proves anything, it proves the defendant guilty of a rape on the person of Yetta Janzen—an offense for which the defendant was not indicted and for which he was never put upon trial; and the question presented is, whether the admission of evidence which proves the defendant guilty of a crime not charged in the indictment is error, for which the judgment should be reversed.

In Russell on Crimes (Vol. 2, p. 772), the author says: "No evidence can be admitted which does not tend to prove or disprove the issue joined. In criminal proceedings the necessity is stronger, if possible, than in civil, of strictly enforcing the rule that the evidence is to be confined to the point in issue. * * * It is therefore a general rule that the facts proved must be strictly relevant to the particular charge, and have no reference to any conduct of the prisoner unconnected with such charge."

It will be remembered that the crime charged against the defendant in the indictment was a rape on the person of Mary

Janzen. Any evidence which tended to prove the defendant guilty of the crime alleged in the indictment was proper for the consideration of the jury, but evidence which tended to prove him guilty of another crime—another rape—on some person not named in the indictment, was not competent. When a defendant is put upon trial on an indictment he is presumed to be ready to meet the charge contained in the indictment, but he is not presumed to be ready to defend against a charge not made against him therein, nor does the law require him to meet such a charge. In Wharton on American Criminal Law (Sec. 635), the author, among other things, says: "It is under no circumstances admissible for the prosecutor to put in evidence the defendant's general bad character or his tendency to commit the particular offense charged; nor is it admissible to prove independent crimes, even though of the same general character, except when falling strictly within the exceptions above stated." The exceptions alluded to by the author would not embrace the evidence under consideration. In *Parkinson v. People*, 135 Ill. 401, a similar question arose, and it was held that evidence tending to prove a similar but distinct offense from that for which one is being tried is not admissible for the purpose of raising an inference or presumption that the prisoner committed the particular act for which he is on trial. See, also, *Baker v. People*, 105 Ill. 452.

In criminal cases, when it becomes necessary to prove a guilty knowledge on the part of a defendant, evidence of other offenses committed by him, though not charged in the indictment, may be admissible for that purpose. Thus, upon an indictment for uttering a forged bank note, knowing it to be forged, evidence may be given of other forged notes having been uttered by the prisoner in order to show his knowledge of the forgery. (2 Russell on Crimes, 777.) The case under consideration, however, is not a case of that character, and the rule there announced has no application to this case. It is true that the court undertook to confine the application of the testimony of Yetta Janzen to the question why she had left home, and to confine the application of the evidence of the three witnesses to a mere contradiction of the defendant's testimony that he had done nothing when in bed with Yetta. There are cases where evidence not admissible generally may be admitted for a single purpose, and may be confined to that

purpose by the instruction of the court. But this is not a case of that character. Here the defendant was indicted for a rape on his own daughter—a girl twelve years old.

On the trial of the defendant for this charge, would it be possible to prove that he had been guilty of a like crime on another daughter who was only a year or two older, and confine the effect of such evidence on the mind of the jury to some trivial or insignificant matter that arose on the trial? The answer to the question is obvious. It is true that the commission of one offense is not evidence of the commission of another and an independent offense, yet the proof of the one cannot be said to be without influence on the mind of the juror, convincing him that the defendant may be guilty of the other. In *Shaffer v. Commonwealth*, 72 Pa., 60, in speaking on this subject, the court said: "Logically, the commission of an independent offense is not proof, of itself, of the commission of another crime, yet it cannot be said to be without influence on the mind, for, certainly, if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged. It therefore predisposes the mind of the juror to believe the prisoner guilty. * * * It is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that serve to confuse and mislead a jury."

Whether the defendant was guilty of the charge contained in the indictment was a question for the jury, and it was the right of the defendant to have that question fairly submitted to them. That has not been done. The evidence of an independent offense was calculated to prejudice the jury, and we think it was error to admit that evidence.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

NOTE.—*Evidence—Res gestae—Hearsay.*—On a prosecution for rape of a child thirteen years of age, it was error to permit the people to show a conversation between prosecutrix and a friend regarding the offense, five months after its commission, when her only reason for not complaining before was that respondent told her that if she told it would be worse for her, and that she was afraid of him. *People v. Duncan*, 104 Mich. 460.

A witness in a rape case, after testifying that before the commission of the offense she saw respondent pulling prosecutrix around, said that her husband remarked about it at the time. In his argument the prosecuting

attorney referred to the act as being an improper overture, so notorious as to attract the attention of both witness and her husband. *Held*, that in admitting said testimony error was committed, which was rendered harmful by the prosecuting attorney's remarks. *Id.*

In a prosecution for rape of a child thirteen years old, prosecutrix testified that she never had intercourse before the alleged offense; that it did not hurt her; that no blood followed, and that she was not sore the next day. *Held*, that it was error to refuse to allow respondent to show that the natural result of intercourse with one of prosecutrix's age, would be pain, followed by blood and soreness. *Id.* (This may be good law under certain circumstances, but not as a general proposition.—*Ed.*)

When the statement of a witness is unreasonable, the jury are not bound to accept it as true. *Id.*

What became of the child born to the prosecutrix in a rape case as the result of the offense, is immaterial on the trial of the alleged offender. *Id.*

Previous chastity of prosecutrix.—On a trial for rape it is proper, on cross-examination, to ask prosecutrix whether, about the time of the alleged offense, she had intercourse with another man.—*State v. Hallenbeck*, 67, Vt. 34. (I doubt the soundness of this proposition.—*Ed.*)

On a trial for rape it is proper to ask prosecutrix whether before and after the alleged offense, her relations with defendant were not cordial. *Id.*

Where, on a trial for rape, a question to prosecutrix on cross-examination is improperly excluded, the error is not cured by an offer to allow defendant to examine her on the same subject when introducing his evidence. *Id.*

On a trial for rape the mother of prosecutrix can not testify as to what a person told her in regard to statements of prosecutrix respecting the alleged offense. *Id.*

(Crown Case Reserved.)

REG. v. TOMLINSON.

(18 Cox's Criminal Law Cases, 75.)

THREATS TO EXTORT: *Demand of money with menaces—Threat of accusation of immorality.*

The expression "menaces" in Sect. 44 of 24 and 25 Vict., c. 96, includes threats of danger to a person by the making of accusations of misconduct against him, although the accusations are not of criminal but of immoral conduct.

(Before Lord Russell, C. J., Pollock, B., Wills, Charles and Lawrence, JJ.)

Case stated by Lawrence, J., as follows:

William Beswick Tomlinson was tried before me at the assizes at Carnarvon on the 26th day of October, 1894, on an indictment charging him under the 44th section of 24 and 25 Vict., c. 96, with sending a letter to one John Thomas Morgan, demanding money with menaces, and in a second count of the said indictment with uttering the said letter.

It was proved at the trial that the prisoner, who was in the employment of the prosecutor, was discovered by the prosecutor and his wife in the act of connection with a woman named Kate Yende, in the prosecutor's stable, in consequence of which the prosecutor discharged the prisoner from his service.

On the 25th day of June the prosecutor received the following letter in the hand-writing of the prisoner, by post:

(Copy.) 18 Penrallt street, Carnarvon.—On the rocks only had a day and half work since leaving Wrexham i want you to let me have 10s so that i can get a can and brush and if i do not get it on or before Tuesday morning i shall let Mrs. Morgan and your friends know of your doings with (Kate Yende) you must understand i am not going to suffer to hide you, i have had enough of it. You are at liberty to show this to your lawyer or any one else if you like, but i shall certainly do it. Yours, W. B. Tomlinson.

At the close of the case for the prosecution it was contended by the counsel for the prisoner that the menaces contained in the letter were not menaces within the meaning of sect. 44 of 24 and 25 Vict., c. 96, but that such menaces must be of injury or violence to the person or property, or of accusation as contained in sects. 46 and 47 of the said statute.

I overruled the objection and left the case to the jury, who found the prisoner guilty, and I released the prisoner on his own recognizances until the determination of this case.

The question for the opinion of the court is, whether I was right in holding that the threats contained in the letter above set out are such threats as are contemplated by sect. 44 of the above-mentioned statute.

24 and 25 Vict., c. 96, s. 44, enacts that: Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing, demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money,

valuable security, or other valuable thing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [now under 27 and 28 Vict., c. 47, s. 2, five years] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

LORD RUSSELL, C. J. The point is not altogether free from difficulty, and it is a matter of regret that no one is instructed to argue it. The question turns upon the construction of the 44th section of the Larceny Act, 1861. But it is necessary in order to determine the true construction of that section to look at certain other sections cognate to the subject treated of in that section. Now, it is enacted by section 44 that: [His Lordship read the section which is set out above.] Section 45 provides that "Whosoever shall, with menaces or by force, demand any property, chattel, money, valuable security, or other valuable thing of any person with intent to steal the same, shall be guilty of felony." And the 46th section provides that, "Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing accusing, or threatening to accuse, any other person of any crime punishable by law with death or penal servitude for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavor to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent in any of such cases to extort or gain by means of such letter or writing any property, etc., from any person," shall be guilty of the offense, and subject to the punishment named in the statute. It is to be observed that the accusations to which that section relates are accusations of crime. The only other section which is material is the 49th, by which it is enacted that, "It shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury or accusation, to be caused or made by the offender or any other person." To come back to what is the true construction of section 44, and to whether the letter, of the writing and sending of which the prisoner has been found guilty, is evidence of a demanding which menaces any property, money,

etc., the point seems to have been taken by counsel for the prisoner that menaces within the meaning of that section means menaces importing a threat of injury to the person or property. In other words, menaces or threats suggesting, if not coupled with, injury to the person or property. It is to be observed that the very next section draws a distinction between the two classes of menaces, because it says, "With menaces or by force." Therefore, it would seem that there was contemplated under the word "menaces" not merely threats of injury to the person or property, but menaces which would involve injury to a third person intended to be injured, and would induce the person to whom the menaces are addressed to part with money or valuable property. In this case we can well see how that a menace of some indecency of conduct would be a holding out of a threat of injury much more serious than if the word were confined to the class of cases suggested. It would be a matter of regret if the court felt itself compelled to put a narrow construction upon the term. It was further suggested that section 49, which states that it shall be immaterial whether the menaces or threats mentioned in the previous sections be of violence, injury or accusation, to be caused or made by the offender or any other person, means violence to the person, injury to the person, or accusation in the sense in which those words are used in section 46, which would be, so far as the word "accusation" is concerned, accusation of crime. Upon the whole, though not without doubt, I have come to the conclusion that the word "menaces" in section 44 is to have a wider meaning than that suggested; and that it may well be held to include threats of danger by the making of accusations of misconduct, although that misconduct may not have amounted to a crime. I think there is some authority for that from what is given as the meaning of the word "menace" in the dictionaries. In some, as in Johnson's dictionary, its meaning is given as merely a "threat," but in Webster's dictionary it is defined amongst other things as "the show of a probable evil or catastrophe." There being no definition of the precise meaning that the legislature intended, we have to look at the ordinary and natural meaning of the word, unless that meaning is displaced by anything contained in the statute. It does not seem to me that there is anything in the statute which would authorize us to displace

that meaning. I have said that there is no authority; but in the case of *Reg. v. Smith* (19 L. J. 80, M. C.; 1 Den. C. C., 510; 2 C. & K., 882), a letter was written to the effect that if a sum of money was paid, an impending catastrophe would be averted; and the question was, whether this came within the earlier statute of 7 and 8 Geo. 4, c. 29, s. 8, which enactment is in point of fact reproduced in the statute on which the indictment in the present case is based. In that case Wilde, C. J., said: "Here the demand of money is accompanied by a statement that, if the money be not paid, the evil before spoken of in the letter will happen, and that evil is that certain burglars of a most horrid gang will break into the house, burn the banker's books, and cause a stoppage of the bank. We are all of opinion that the terms of the letter amount to a distinct menace that the evil will happen unless the money is paid." There is one other case which is reported in Leigh's Crown Cases, at p. 288, called Walton's case. I refer to this case because, while stating what I conceive to be the meaning of the section, it points out what is the character of the threat before it comes within the section. There the prisoner had obtained money by threatening to execute a distress warrant, which he had no authority to do, and the jury were directed, as a matter of law, that the conduct of the prisoner constituted a menace within the statute.

The court for Crown Cases Reserved, however, quashed the conviction on the ground that it was not for the judge to do more than lay down the principle upon which the jury ought to proceed in considering whether the threat which had been used there was or was not within the statute, and that it was not for him to say as a matter of law that it did amount to a menace within the statute. The court further held that he ought to have told the jury that the question was whether or not the threat or words used, which were said to amount to a threat, was such as would naturally unsettle the mind of the person on whom it operated, and cause him to act in a way in which he would not otherwise act. In this case no complaint is made of the summing up of the learned judge; therefore, it must be assumed that that was the character of his summing up. It seems to me that there is no restriction placed by the statute upon the ordinary meaning of the term menaces in section 44, and that, therefore, this conviction must be affirmed.

POLLOCK, B. I have come to the same conclusion, and have nothing to add.

WILLS, J. I am of the same opinion. I think that the case comes within section 49 of the act—I do not think that it is necessary even to rely upon that section, for I think that the injury with which a person is threatened should, in order to bring the menace within section 44, receive a liberal interpretation, and that it does not mean an actionable injury only, but includes any injury which is calculated to do a person harm. I also think that the accusation is certainly not to be confined to cases which come within section 46. What that section says is that, if the accusation takes the form of the cases stated in the section, then a larger amount of punishment is to be awarded. I think that the term "accusation" means that which in the ordinary sense of the term would amount to an accusation. I have always thought that persons who are practiced upon in this way are not possessed of the ordinary powers of resisting, therefore, I think that a liberal interpretation should be put upon the words. In my opinion this conviction should be affirmed.

CHARLES, J. I am of the same opinion. I do not think that in either sections 45, 46, 47, or 49 are any words which would justify us in placing the restrictive meaning upon the words in section 44 which it is sought to place upon them.

LAWRENCE, J., concurred.
Conviction affirmed.

PEOPLE v. DURRANT.

(116 California, 179.)

MURDER: *Selection of jury list—Special venire—Impaneling, examination and qualification of jurors—Review of verdict—Proof of motive—Contempt proceedings—Evidence—Trial—Argument of counsel—Grounds for new trial—Newspaper articles.*

1. The minutes of the secretary of the judges of the Superior Court of San Francisco County, showing the selection and return of the jury list, as required by statute, may be amended, when incomplete, to conform to the facts.

2. On a challenge to the panel, on the ground that the jury list was not legally selected by the judges, the testimony of the presiding judge is admissible to supplement the record when incomplete, and to show the action actually taken.
3. The fact that some of the persons selected as jurors in making up the jury list do not possess the necessary qualifications is not a ground for challenge to the panel.
4. Under the provision of the present constitution of California by retaining in force all existing laws relative to the judicial system and making them applicable to the new system, providing for the selection of jurors in San Francisco county, the statute is not rendered unconstitutional, by the subsequent amendments making it conform to the present system.
5. The fact that jurors were summoned by special venire, without having first exhausted all the names upon the regular list, is not ground for challenge to the panel.
6. The action of the court in disallowing a challenge to a juror for cause will not be reviewed where the defendant did not challenge the juror peremptorily, and he had not exhausted his peremptory challenges.
7. Under a statute providing that a court may for cause permit a challenge to be taken to a juror after he is sworn, and before the jury is completed, a court may permit the re-examination of a juror by either the people or the defendant on a matter coming to their knowledge after his acceptance, and before the completion of the panel, and may, in its discretion, allow a peremptory challenge to be taken, though such examination discloses no ground of challenge for cause.
8. The correctness of a verdict which has been sustained by the trial court will not be reviewed on appeal on arguments directed to the credibility of the witnesses or the weight to be given to their testimony.
9. A verdict of conviction will not be disturbed on appeal, as unsupported by evidence, unless the evidence to sustain it is so slight as to make clear the inference that it must have been rendered under the influence of passion or prejudice.
10. While absence of proof of a motive for the commission of a crime is a circumstance in favor of the defendant, such proof is not indispensable to a conviction.
11. The issuance of process for contempt charged to have been committed by the publishers of newspapers during the progress of a cause rests entirely in the sound discretion of the court, and can not be controlled by the parties, nor have they any right of appeal from the court's action in the matter.
12. Proof that a witness is a practicing physician and surgeon, and that he performed an autopsy on the body of a dead person, qualifies him to give an opinion as to the means used to produce death, it being conceded that the question is a proper one for expert testimony.
13. The use of a dressmaker's frame in court for convenience in exhibiting the clothing of a murdered woman, which was introduced in evidence, and in regard to which much testimony was taken, was not prejudicial to the defendant, no claim being made that the frame represented the height, size, or figure of the deceased.
14. It is the right and duty of a trial court, on its own motion, to curtail

the cross-examination of a witness on a collateral matter, which is wholly irrelevant, and as to which the witness could not be impeached.

15. Under a statute (which gives a witness the right to be protected from irrelevant, improper, or insulting questions), where a lady as a witness had stated that she had seen the defendant since a date named, a following question, "That is, you imagine you have?" was properly excluded by the court.
16. A photograph of a person charged to have been murdered, though taken two years before her death, is admissible in evidence when shown to be a fair representation of her as she appeared at the time of her death.
17. Where a witness has given testimony in apparent variance with his testimony on the preliminary examination, it is not improper for the party calling him to call his attention to his former testimony, for the purpose of refreshing his recollection.
18. It is not error to overrule an objection to a question the answer to which may be relevant, though, when given, it proves not to be.
19. While a hypothetical question must be based on facts in evidence, it need not embrace all the facts shown, nor be limited to such facts, but may be addressed to any reasonable theory which may be drawn from them.
20. While an opinion is not admissible on a matter of common knowledge or experience, its admission is harmless error where it accords with such common knowledge.
21. A witness for the prosecution testified that he fitted certain tools, found apparently in the possession of another than defendant, in marks on a door, which they did not fit, after which defendant introduced the tools in evidence. *Hehl*, that it was proper to permit the prosecution to introduce the door in evidence on rebuttal, and to have the witness fit the tools to the marks in the presence of the jury.
22. A question to a defendant as a witness, asking if he had not prepared a statement which he sealed and delivered to his attorneys, with certain instructions as to opening it, is not subject to objection on the ground that such statement would be privileged, the question being merely preliminary, and such contents not being privileged as to any one acquiring a knowledge of them otherwise than through the attorneys.
23. Where a question to a witness by the prosecution is admitted over objection, on the ground that it is preliminary, with a statement by the court that, if not followed up, the testimony will be stricken out on motion, and, the answer being adverse to the prosecution, the matter is dropped the defendant is not prejudiced, and will be presumed to have been satisfied to allow the testimony to remain unless he moves to strike it out.
24. The fact that a person was brought before the court for contempt during the trial of a defendant for murder, charged with having said to a juror in the case, "If you don't hang him [defendant], we will hang you," and was given a hearing in the presence of the jury, and punished for the contempt, was not prejudicial to the rights of defendant, who did not instigate nor conduct the proceeding, and made no request that the jury be excluded.
25. The use by a district attorney, in argument, of an empty box, to illustrate the quantity of gas which could leak in a given time and under

circumstances testified to, was not error prejudicial to the defendant; the jury being cautioned by both the attorney and the court that the box was not in evidence, nor any proof of its capacity, and that the statements of the attorney were merely by way of argument.

20. The fact that the newspapers of a city where a murder was committed continued to publish sensational articles in regard to the crime, and after defendant's arrest, both before and during his trial, treated him as the undoubted criminal, and aroused public sentiment strongly against him, does not alone show that he did not have a fair trial, and will not require the granting of a new trial, where a satisfactory jury was obtained without defendants having exhausted his peremptory challenges, and each juror makes affidavit that he neither read nor heard read any of the publications during the trial, and at all times obeyed the injunctions of the court, and was not influenced in any way by anything outside the evidence, and where it does not appear that defendant was prevented from making his full defense.

Appeal from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Hon. D. J. Murphy, Judge.

The latter part of instruction X asked for by the defendant, and refused, which is referred to in the opinion of the court, was as follows: "It is safer to err in acquitting, and better that many guilty persons should escape, than that one innocent man should suffer. Justice never required the sacrifice of a victim; an erroneous conviction is calculated to produce incalculable and irreparable mischief to individuals, to destroy all confidence in the justice and integrity of the tribunals, and to introduce an alarming train of social evils as the inevitable result." The further facts are stated in opinion of the court.

John H. Dickinson, Eugene N. Deuprey, and Henry E. Monroe, for appellant.

The evidence is entirely circumstantial, and will not bear in any way the test of the law as it is established upon the subject of circumstantial evidence. 3 Rice's Criminal Evidence, 545-53, 561-65; Burrill's Circumstantial Evidence, 733-81; Wills' Circumstantial Evidence, 173-94; Starkie on Evidence, 9th Ed., Sec. 586; Cushing on Evidence, 296, 312, 313, 318, 319; Bishop's Criminal Procedure, 3rd Ed., Sec. 1106; Phillips on Evidence, 459, 463; Roscoe's Criminal Evidence, 7th Ed., 14; *People v. Phipps*, 39 Cal. 326; *People v. Anthony*, 56 Cal. 397-400; *People v. Travers*, 88 Cal. 233; *People v. Padilla*, 42 Cal. 535; *People v. Kerrick*, 52 Cal. 447; *People v. Carrillo*, 70

Cal. 645; *People v. Ferry*, 84 Cal. 35; *People v. Strong*, 30 Cal. 154; *People v. Davis*, 64 Cal. 441, and many other cases. The unnatural and frightful murder committed created in the minds of the people a sense of horror and overwhelming bitterness, and, under this condition of affairs, circumstantial evidence ought to be acted on with great caution. 3 Rice's Criminal Evidence, 560; Phillips on Evidence, 458-68; Roscoe's Criminal Evidence, 7th Ed., 14.

The jury failed to appreciate the principle of law that it is safer to err in acquitting, and better that many guilty persons should escape than that one innocent man should suffer. 3 Rice's Criminal Evidence, 564, 565; Wills' Circumstantial Evidence, c. 6, pp. 173-94. The identity of the accused was not established to a moral certainty beyond a reasonable doubt. Harris on Identification, Secs. 1, 3, 7; 3 Rice's Criminal Evidence, Secs. 303, 304; 3 Greenleaf's Evidence, Sec. 30; Wills' Circumstantial Evidence, c. 47; *Nichols v. People*, 17 N. Y. 114; *McCurney v. People*, 83 N. Y. 408; 38 Am. Rep. 456; *People v. Nelson*, 85 Cal. 430. The *alibi* of the defendant was set up from the moment of his arrest, and consistently maintained throughout the subsequent proceedings, and should have been given more weight by the jury. 3 Rice's Criminal Evidence, 420, 422, 427; Wills on Circumstantial Evidence, 168; *Walters v. State*, 39 Ohio St. 215; *Blankenship v. State*, 55 Ark. 244; *People v. Fong Ah Sing*, 64 Cal. 253. The jury failed to take into consideration the good character of the defendant, which outweighed the other evidence, and which should have raised a reasonable doubt in the minds of the jury as to the defendant's guilt, and thereby have compelled a verdict of acquittal. *People v. Ashe*, 44 Cal. 288; *People v. Doggett*, 62 Cal. 27; *People v. Shepardson*, 49 Cal. 630; *People v. Bowman*, 81 Cal. 566. The character of the defendant having been proven to be good, the jury should have believed his testimony. *People v. Cowgill*, 93 Cal. 596; *Chambers v. People*, 105 Ill. 409; 3 Rice's Criminal Evidence, 159. From the evidence it can not be said that no other person than the defendant committed the murder, and it was therefore the duty of the jury to acquit the defendant. *People v. Kerrick*, 52 Cal. 446; *People v. Brown*, 56 Cal. 406; *People v. Brown*, 59 Cal. 345.

The prosecution failed to show any motive on the part of the defendant for the killing, and it therefore became the man-

ifest duty of the jury to acquit. *People v. Bennett*, 49 N. Y. 137; *Gordon v. People*, 33 N. Y. 501; 3 Rice's Criminal Evidence, 444-47, 547. The court erred in amending the record of the drawing of the trial jurors, which did not show compliance with the law, it not appearing that a list of grand jurors was first selected, nor shown that the trial jurors were selected from qualified jurors from the different wards in proportion to their number. Code Civ. Proc., Secs. 205, 206. Section 204 of the Code of Civil Procedure is unconstitutional, because it has no uniform operation. Const., Art. I, Sec. 11. The court erred in ordering a special venire without any showing of necessity, or exhaustion of names in the trial jury box. Code Civ. Proc., Secs. 127-214. The court erred in disallowing the challenge to the jurors Nathan and Crocker, as each of them had formed an opinion which it would require evidence to remove. *State v. Murphy*, 9 Wash. 204; *State v. Wilcox*, 11 Wash. 215; *People v. Larubia*, 140 N. Y. 87; *People v. McQuade*, 110 N. Y. 284; *People v. Fredericks*, 106 Cal. 559; *People v. Wells*, 100 Cal. 227. The court erred in permitting juror Brown to be re-examined and peremptorily challenged without good cause. *People v. Reynolds*, 16 Cal. 129. The court erred in not citing the newspaper editors to show cause why they should not be punished for contempt of court, as the articles published during the trial tended to prejudice the minds of the public and jury. Rapalje on Contempt, 70; *Myers v. State*, 46 Ohio St. 473, 15 Am. St. Rep. 638; *Hollingsworth v. Duane*, Wall. C. C. 77, 100, 102; 1 Bishop's Criminal Law, 288; Wells on Jurisdiction, 191; *State v. Judge, etc.*, 45 La. Ann. 1250, 40 Am. St. Rep. 282; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *Bayard v. Passmore*, 3 Yeates (Pa.), 438, 440; *State v. Morrill*, 16 Ark. 384; *In re Sturoc*, 48 N. H. 428, 97 Am. Dec. 626; *People v. Freer*, 1 Caines, 518; *In re Crown Bank*, L. R. 44 Ch. Div. 649; *Cooper v. People*, 13 Colo. 337; *In re Shortridge*, 99 Cal. 532; 37 Am. St. Rep. 78; *People v. Stokes*, 103 Cal. 198; 42 Am. St. Rep. 102; *People v. Goldenson*, 76 Cal. 353. The court erred in overruling the objection on the part of the defendant to the question of the witness, Dr. Farnum, as to the purpose for which wooden blocks were employed in relation to dead bodies. See *People v. Devine*, 95 Cal. 227; *People v. Wells*, 100 Cal. 459; *People v. Lee*, 78 Cal. 317; *Gale v. People*, 26 Mich. 161; *People v. Cahoon*, 88 Mich. 456;

Leahy v. State, 31 Neb. 566. The court erred in allowing a statement to be made of a hypothetical case introducing facts of which there was no proof. An opinion based upon such hypothetical statement is error. Rogers' Expert Evidence, Sec. 27; *In re Will of Ames*, 51 Iowa, 596-603; *Hurst v. C.*, *R. I. & P. R. R. Co.*, 49 Iowa, 76; *State v. Cross*, 68 Iowa, 180-92; *State v. Hanley*, 34 Minn. 430-33; Wharton's Criminal Evidence, 9th Ed., Sec. 418.

Attorney-General W. F. Fitzgerald and Assistant Attorney-General W. H. Anderson, for respondent.

It was not necessary for the prosecution to show any motive for the commission of the crime by the defendant. 1 Bishop's Criminal Evidence, Sec. 1107; *Pointer v. United States*, 151 U. S. 413; *Johnson v. United States*, 157 U. S. 320; *People v. Fish*, 125 N. Y. 136; *People v. Trezza*, 125 N. Y. 740; *People v. Johnson*, 139 N. Y. 358, 362; *People v. Feigenbaum*, 148 N. Y. 636; *State v. Coleman*, 20 S. C. 441; *Clifton v. State*, 73 Ala. 473; *State v. Miller*, 9 Houst. 564; *McLain v. Commonwealth*, 99 Pa. St. 89, 99; *Sumner v. State*, 5 Blackf. 579; 36 Am. Dec. 561. If the jury believed the witnesses for the prosecution, it was their duty to distrust, and their privilege to disregard and reject, all of the defendant's testimony. Code Civ. Proc., Sec. 2061, subd. 3; *White v. Disher*, 67 Cal. 402; *People v. Sprague*, 53 Cal. 491; *People v. Hicks*, 53 Cal. 354; *People v. Soto*, 59 Cal. 367, 369, 370; *People v. Flynn*, 73 Cal. 511, 515; *People v. Clark*, 84 Cal. 573, 582, 583. The only evidence of *alibi* is the testimony of the defendant himself, and is not sufficient to establish it. Burrill on Circumstantial Evidence, 517, 518; Wills on Circumstantial Evidence, 171. All the circumstances proven concur to show that the defendant committed the crime charged, and are inconsistent with any other rational conclusion. This is all the law requires. *People v. Shuler*, 28 Cal. 490; *People v. Strong*, 30 Cal. 151; *People v. Cronin*, 34 Cal. 202; *People v. Murray*, 41 Cal. 67; *People v. Anthony*, 56 Cal. 397; *People v. Morrow*, 60 Cal. 142; *People v. Darr*, 61 Cal. 554, 555; *People v. Keeley*, 81 Cal. 210, 213; *People v. Urquidas*, 96 Cal. 239. The weight to be given the evidence as to the good character of the defendant is for the jury, and if they believe the defendant guilty they must so find, notwithstanding his good character. *People v. Samuels*, 66 Cal.

99, 101; *People v. Kalkman*, 72 Cal. 212. The presiding judge had the inherent right and power to correct his record to make it correspond to the facts. *Kaufman v. Shain*, 111 Cal. 16, 19, 23; 52 Am. St. Rep. 139. The term trial jurors were properly selected in compliance with the law. Code Civ. Proc., Sec. 204; *People v. Young*, 108 Cal. 8. The challenge to the special venire was properly denied by the court, as the objection was not based on section 1064 of the Penal Code, and there is no other ground of objection. *People v. Southwell*, 46 Cal. 141; *People v. Welch*, 49 Cal. 174, 177, 178; *Bruner v. Superior Court*, 92 Cal. 239, 253; *People v. Wallace*, 101 Cal. 281-83. The court did not err in denying the defendant's challenge to the jurors, Nathan and Crocker. Their opinions founded upon public rumor or newspaper statements, which could be removed by evidence, were not unqualified, and therefore did not disqualify them as jurors. *People v. McCauley*, 1 Cal. 379; *People v. Reynolds*, 16 Cal. 129; *People v. Williams*, 17 Cal. 142, 144, 146; *People v. Mahoney*, 18 Cal. 180; *People v. Simonds*, 22 Cal. 349, 351; *People v. Murphy*, 45 Cal. 137; *People v. Brown*, 59 Cal. 345, 354; no error can be presumed from the disallowance of a challenge for cause where all the peremptory challenges have not been exhausted. Thompson on Trials, Sec. 120; *State v. Groch*, 94 N. C. 987; *State v. Hensley*, 94 N. C. 1021; *State v. Jones*, 97 N. C. 469; *State v. Pritchett*, 106 N. C. 667; *Williams v. State*, 30 Tex. App. 354, 368; *State v. Le Duff*, 46 La. Ann. 546; *People v. Aplin*, 86 Mich. 393; *Brumback v. German Nat. Bank*, 46 Neb. 540, 542; *Prewitt v. Lambert*, 19 Colo. 7, 9; *Jenkins v. Mitchell*, 40 Neb. 664. The court did not err in allowing the challenge of Brown, after he had been sworn as a juror, as it was within the discretion of the court so to do. *People v. Bemmerly*, 87 Cal. 117; *People v. Montgomery*, 53 Cal. 576. But even if the court did err in allowing the challenge to juror Brown, it is immaterial as the action of the court is not the subject of an exception, and is not open to review upon appeal. Pen. Code, Sec. 1170; *People v. Murphy*, *supra*; *People v. Colson*, 49 Cal. 679; *People v. Atherton*, 51 Cal. 495. The allowance of the challenge to juror Brown, if error, was error without injury, as the defendant had not exhausted all of his peremptory challenges when the jury was finally impaneled. *State v. Hensley*, *supra*; *State v. Jones*, *supra*; *State v. Aarons*, 43 La. Ann. 406;

Territory v. Roberts, 9 Mont. 12; *People v. Fowler*, 104 Mich. 449; *State v. Kluseman*, 53 Minn. 541, 544; *Thompson v. Douglass*, 35 W. Va. 337; *State v. Ching Ling*, 16 Or. 419; *Snow v. Weeks*, 75 Me. 105; *State v. Cady*, 80 Mo. 413. The action of the court in refusing to cite the newspaper editors for contempt of court during the trial was proper. It was in the discretion of the court, and its action was not a proper subject of exception. 4 Ency. of Pl. & Pr. 766, 767, 774; 3 Am. & Eng. Ency. of Law, 780; Thompson on Trials, Sec. 124. It is manifest that the jury was not influenced by the newspaper publications, and therefore the defendant was not injured by the refusal of the court to issue the citation for contempt. *People v. Golden-son*, 76 Cal. 328, 353; *People v. Murray*, 85 Cal. 359, 361; *People v. Murray*, 94 Cal. 212; 28 Am. St. Rep. 113. The question asked Dr. Barrett as to what was the means used for the strangulation was competent, as a proper foundation had been laid to ask this question of the doctor as an expert. Wharton's Criminal Evidence, 9th Ed., Sec. 412.

Doctor Barrett's answer that he thought the means used were hands, was proper and responsive to the question. *People v. Barker*, 60 Mich. 277; 1 Am. St. Rep. 501. The question asked Mrs. Vogel as to whether or not she knew in whose name the title to the property stood was irrelevant, and properly ruled out. *Depuy v. Williams*, 36 Cal. 310, 316; *Marshall v. Hancock*, 80 Cal. 82-4; *Taylor v. Kelly*, 103 Cal. 178, 186; *Havens v. Donahue*, 111 Cal. 297, 301. The court did not err in instructing Mrs. Vogel not to answer the question asked her. Thompson on Trials, Sec. 352; Rice's Criminal Evidence, 334, 335; 1 Bishop's New Criminal Procedure, Sec. 966.

The statement of counsel for the defendant to Mrs. Crossett, that she imagined she had seen the defendant, was improper, and the judge properly rebuked the counsel therefor. Rice on Criminal Evidence, 334, 335; Thompson on Trials, Sec. 354. The photograph of the deceased was shown to be a fair representation of her at the time of her death, and was therefore properly admitted. Rice's Criminal Evidence, 154; Wharton's Criminal Evidence, 9th Ed., Sec. 544; Thompson on Trials, § 869; *Udderzook v. Commonwealth*, 76 Pa. St. 340; 1 Bishop's New Criminal Procedure, § 1097; *People v. Fisher*, *supra*. The action of the district attorney in reading from the tran-

script of Mr. King's testimony at the preliminary examination and asking him if he had so testified, was proper for the purpose of refreshing his memory. Code Civ. Proc. § 2047; *Paige v. Carter*, 64 Cal. 489, 490; *Reid v. Reid*, 73 Cal. 206, 209; *Burney v. Ball*, 24 Ga. 505; *Hubby v. State*, 8 Tex. Cr. App. 597, 607; *White v. State*, 18 Tex. App. 57; *Sisk v. State*, 28 Tex. App. 432; *State v. Miller*, 53 Iowa, 154, 155; *Hull v. Alexander*, 26 Iowa, 569; *Beaubien v. Cicotte*, 12 Mich. 459, 468.

The question asked Dr. Farnum as to the purpose for which wooden blocks were used in the medical college in connection with dead bodies, was not a subject to general objection. *Brumley v. Flint*, 87 Cal. 473; *Crocker v. Carpenter*, 98 Cal. 418, 421; *Colton, etc., Co. v. Swartz*, 99 Cal. 278. The hypothetical question asked Dr. Farnum was based on a state of facts reasonably inferred from the evidence, and was therefore proper, as it is not necessary that the facts be proven, any state of facts which it may be claimed the evidence justifies may be assumed. Thompson on Trials, §§ 604, 606, 608-10; *Harnett v. Garvey*, 66 N. Y. 641; *Lovelady v. State*, 14 Tex. App. 545, 560; *Guterman v. Liverpool, etc., S. S. Co.*, 83 N. Y. 358; *Crowley v. People*, 83 N. Y. 464, 470; 38 Am. Rep., 464; *Filer v. New York, etc., R. R. Co.*, 49 N. Y. 47; 10 Am. Rep., 327; *People v. Goldenson*, *supra*; *Wintringham v. Hayes*, 144 N. Y. 1; 43 Am. St. Rep. 725; *Yardley v. Cuthbertson*, 108 Pa. St. 335; 56 Am. Rep. 218; *Quinn v. Higgins*, 63 Wis. 664; 53 Am. Rep. 305; *Meeker v. Meeker*, 74 Iowa, 352; 7 Am. St. Rep. 489.

The action of the court in permitting officer Reynolds to fit the chisel in the mark on the jamb of the door was proper. *Commonwealth v. Sturtivant*, 117 Mass. 122; 19 Am. Rep. 401. Miss Cunningham's evidence was a clear and direct contradiction of the defendant, and clearly admissible. Code Civ. Proc. § 2051; Rice's Criminal Evidence, 367. The use of the box by the district attorney was not error. Thompson on Trials, § 992.

HENSHAW, J. The defendant, convicted of the murder of Blanche Lamont, prosecutes these appeals from the judgment, and from the order denying him a new trial.

Reviewing the specifications of error in their natural sequence, rather than in the order of their presentation in argument, the first which invite attention are defendant's

challenges to the panel. He contended that the list of trial jurors had not been selected or returned as required by sections 204 to 209 of the Code of Civil Procedure. In support of this contention, he offered the record of the proceedings of the judges of the Superior Court in the matter. This record, kept by the secretary of the judges, was incomplete. Under direction of the presiding judge, the secretary amended his record, and, as amended, his minutes showed a compliance with the law. The presiding judge was permitted to testify to the facts attending the selecting and listing of the trial jurors, from which it appeared that the proceedings of the judges were due and regular. Defendant's objection that the original minutes of the secretary were the sole evidence admissible upon the question can not be sustained. It was the inherent right of the court to correct its records to make them comport with verity. *Kaufman v. Shain*, 111 Cal. 16, 43 Pac. 393. The secretary's minutes are not made exclusive evidence of the proceedings they undertake to record. It was the duty of the trial judge to determine the facts, and no better evidence could have been offered than that of the presiding judge, himself an actor in and creator of them.

The further objection that the judges failed to comply with the law, in that, of the jurors selected, some did not possess the requisite qualifications, is equally untenable as a ground of challenge to the panel. *People v. Young*, 108 Cal. 12; 41 Pac. 281. To hold mandatory the provisions of section 205 of the Code of Civil Procedure, and thus to require of the judges the strictest compliance with the law in the matter of the selection of jurors, would be to the last degree unreasonable. They would then be obliged to lay aside all other business, and devote their time for days, and perhaps weeks, to personal inquiry, inspection and examination of 3,600 men (the number of jurors called for), and, after this labor, to decide, at the peril of a rejection of the whole panel, that to the final name upon the list each man possessed all the qualifications of a juror. The provisions of the section are directory, and a substantial compliance with them is here shown, and is all that may be demanded.

Section 204 of the Code of Civil Procedure provides that in counties, and cities and counties, of more than 100,000 inhabitants, the judges of the superior court shall select and return

trial jurors. Though the section was amended in 1881, and again in 1893, the provisions relative to cities and counties of over 100,000 inhabitants continued unchanged so far as affects this consideration. Before the present constitution went into operation, the jurors were selected by the district judges of the several judicial districts within the city and county of San Francisco, the county judge, the probate judge and the judge of the municipal criminal court. The amendments to the section made after the adoption of the present constitution were designed to meet the new judicial system provided for by that instrument. This section was a part of the code before the adoption of the existing constitution, and by that instrument (article 22, § 11), all laws relative to the judicial system then in force were made applicable to the new system therein provided for. Section 204 of the Code of Civil Procedure was not unconstitutional under our earlier organic law, and did not become unconstitutional by virtue of the present one. To the contrary, the section was expressly retained in force.

The court summoned jurors by special venire. To the panel thus formed, defendant objected. The objection was not based upon section 1064 of the Penal Code, but upon the ground that the regular jury list had not been exhausted. This is not a ground for challenge. Code Civ. Proc. §§ 226, 227; *Levy v. Wilson*, 69 Cal. 111, 10 Pac. 272; *People v. Vincent*, 95 Cal. 425, 30 Pac. 581. The court may summon jurors by special venire without exhausting all of the names upon the regular list.

To the jurors Crocker and Nathan challenges were interposed for actual bias, under subdivision 2 of section 1073 of the Penal Code. The challenges were disallowed. Whether or not the jurors Crocker and Nathan, or either of them, were shown to be disqualified by actual bias against the defendant, and therefore, whether or not the trial court erred in disallowing the challenges interposed to them, is not, under the facts presented by the record, a subject for consideration by this court. The challenges for cause having been disallowed, the defendant did not see fit to exercise his right of peremptory challenge upon either of the jurors, but accepted them both. When the jury was completed, defendant still had in reserve, and unemployed, eight of his twenty peremptory challenges. It has in this state been held in numerous

instances that if the judge errs in disallowing a challenge for cause, and the defendant thereafter excuses the obnoxious juror under a peremptory challenge, and the jury is completed without the exhaustion by the defense of all of its peremptory challenges, the error of the court will not be reviewed upon appeal, because no injury could have resulted to the defendant. *People v. Gatewood*, 20 Cal. 146; *People v. Gaunt*, 23 Cal. 156; *People v. Weil*, 40 Cal. 268; *People v. McGungill*, 41 Cal. 429. The situation here differs somewhat from that presented by the cases last above cited. But the reasoning which governed those decisions is strictly applicable to present consideration. The defendant may not have reviewed an error which he has invited or has failed to avoid by the legal means at his command. If the defendant feared to put himself upon trial before the jurors whom he had challenged, it was his duty to have availed himself of the liberal aid which the law affords, and to have excused them from the box. If, in so doing, he lessened the number of his peremptory challenges to such an extent that it appears they were exhausted before the completion of the jury, he may well be heard to urge in argument that by reason of the erroneous ruling, the number of his peremptory challenges was improperly curtailed, and he was deprived of a legal right; but if it is shown, as here, that the two jurors in question were accepted and allowed to remain, when the defense could have exercised peremptory challenges upon them, and, further, that, at the time when the jury was completed, there was still held in reserve by the defense nearly half of its peremptory challenges—if, under these circumstances, error was committed by the trial court, it was either permitted by the defense, or acquiesced in by its failure to exercise its legal right, and the ruling will not be reviewed. There will be found in the cases some slight diversity of opinion upon the question, but the great weight of authority is in support of the view above expressed. Thompson on Trials (section 120) thus declares the principle: "It is a rule of paramount importance that errors committed in overruling challenges for cause are not grounds of reversal, unless it be shown an objectionable juror was forced upon the challenging party after he had exhausted his peremptory challenges. If his peremptory challenges remain unexhausted, so that he might

have excluded the objectionable juror by that means, he has no ground of complaint." The rule above stated finds overwhelming support from the authorities, of which a few may be cited: *State v. Gooch*, 94 N. C. 987; *Williams v. State*, 30 Tex. App. 354, 17 S. W. 408; *State v. Le Duff*, 46 La. Ann. 546, 15 South. 397; *State v. Yetzer* (Iowa), 66 N. W. 737; *State v. Hartley* (Nev.), 40 Pac. 372; *People v. Aplin*, 86 Mich. 393, 49 N. W. 148; *Brumback v. Bank*, 46 Neb. 540, 65 N. W. 198; *Prewitt v. Lambert*, 19 Colo. 7, 34 Pac. 684; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, and 17 N. E. 191.

Nine jurors had been sworn to try the case. At this stage of the proceedings the district attorney sought and obtained permission of the court to reopen the examination of one of these (Brown), and to question him upon matters which had come to his knowledge since his acceptance as a juror. Permission was granted over objection and exception of defendant. At the conclusion of the examination, the district attorney asked leave to interpose a peremptory challenge to the juror. Leave was given, and this ruling was assigned as error. Section 1068 of the Penal Code provides that a challenge (either peremptory or for cause) must be taken when the juror appears, and before he is sworn to try the cause; but the court may, for cause, permit it to be taken after the juror is sworn, and before the jury is completed. It was not error, therefore, for the court to permit a re-examination of the juror upon matters coming to the knowledge of the people or defendant after his acceptance, and before the completion of the jury. The course here pursued was that followed in *People v. Bemmerly*, 87 Cal. 117, 25 Pac. 266, and approved by this court.

The new matter upon which the juror Brown was questioned touched his connection with the case of one Howell, who had been tried in a federal court for passing counterfeit money. Brown had been a juror in the case, and, with others, had voted for Howell's acquittal. The result was a disagreement of the jury, and a mistrial. Rumors that the Howell jury had been approached and corrupted were current, and the next federal grand jury instituted an investigation. Brown was summoned before it, and interrogated as to his knowledge of the matter; but, in justice, it should be added that the record before us does not disclose that his own integrity was under assault.

There was undoubtedly not enough in this to warrant the interposition of a challenge for cause; but section 1068 of the Penal Code contemplates also the taking of a peremptory challenge, as was done in this case. When the code says that the court may, for cause, permit the challenge to be taken, it means, as the language has been interpreted, that it is not a matter of right to either party, but may be permitted in the exercise of a sound discretion (*People v. Reynolds*, 16 Cal. 128; *People v. Montgomery*, 53 Cal. 576; *People v. Bemmerly*, 87 Cal. 117, 25 Pac. 266); and, as said in *People v. Montgomery*, in granting or refusing permission it will not be presumed that the court has abused its discretion. In all matters not ordered by inflexible rule, no set formula applicable to every case may be laid down to govern and measure the exercise of discretionary power. As each case arises, its determination must rest upon its peculiar facts, and what might be an abuse under one set of circumstances might be a fair exercise under another. In every case careful regard will be had to see whether or not the substantial rights of a defendant have been jeopardized or impaired, but, if they have not, then the ruling is not to be disturbed, for, at the worst, it could be but a technical error, which the courts are commanded to disregard. Penal Code, § 1404. Having in view the nature of the district attorney's inquiry, and his manifest suspicion that the juror was or had been approachable and venal, it might well be that, as a result of the inquiry, the juror was left in a state of extreme hostility to the prosecuting officer. He, upon his part, had failed to establish ground for a challenge for cause, and, if he could not exercise a peremptory challenge, would be compelled to try and to argue his case before a juror whose attitude naturally was one of bitter antagonism to him. It may safely be said that, however disinterested a juror might be as between the litigants, no advocate cherishing his client's interests would willingly accept one whom he believed to be his personal enemy. These obvious considerations were in the mind of the trial judge. Moreover, the defendant had not exhausted his peremptory challenges. Four other jurors were obtained, to none of whom was any challenge taken by the defense; and, as has been said, when the jury was finally completed there remained to the defense, unexercised, eight of its twenty peremptory challenges. The ruling by which the prosecution was

allowed to interpose the peremptory challenge worked no hardship to the defendant. His right was to a fair and impartial jury, not to a jury composed of any particular individuals. When it appears that a fair and impartial jury was obtained, it is the general rule that an error of the court in allowing a challenge, and permitting a juror to be excused, is not subject to review. *Territory v. Roberts*, 9 Mont. 12, 22 Pac. 132; *State v. Klauseman*, 53 Minn. 541, 55 N. W. 741; *State v. Chin Ling*, 16 Or. 419, 18 Pac. 844; *Snow v. Weeks*, 75 Me. 105; *Tompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015; *John D. C. v. State*, 16 Fla. 554; *State v. Ward*, 39 Vt. 225; *Watson v. State*, 63 Ind. 548; *Tatum v. Young*, 1 Port. (Ala.) 298; *Richards v. State*, 36 Nebraska, 17. It can not be said, under the circumstances shown, that any injury resulted to defendant from the ruling, or that any abuse of discretion is shown. *People v. Arceo*, 32 Cal. 40; *People v. Murray*, 85 Cal. 350, 24 Pac. 666; *People v. Murphy*, 45 Cal. 137.

The contention of appellant next to be considered is that the evidence is insufficient to justify the verdict, and that the verdict is contrary to the evidence, in this: that the evidence fails to show how, when or where Blanche Lamont was murdered, or that the defendant in any way was instrumental in causing her death. No small part of appellant's argument herein is devoted to an attack upon the credibility of the witnesses for the prosecution. In this attack the personal characters of many are assailed, and the unreliability of the evidence of nearly all is insisted upon. It here again becomes necessary to repeat that arguments touching the credibility of witnesses and the weight to be given their testimony—arguments eminently proper to be addressed to the jury or to the judge upon motion for a new trial—are not for our consideration. This court sits in criminal cases solely for the correction of errors at law. If, in any criminal case, there be evidence adduced logically tending and legally sufficient to prove the guilt of a defendant, this court can not and will not disturb the jury's determination, even under a claim that there is conflicting evidence which might have raised a reasonable doubt of his guilt. The province of the jury in weighing evidence, and determining the degree of credibility to be accorded the testimony of witnesses, is, under the rules of law, exclusive. A judge may not instruct upon matters of fact. If a witness should absolutely

discredit his own testimony by swearing to opposite statements, so that one or the other must be false, under our laws his testimony is not of necessity to be rejected. It is still evidence in the case. Under such circumstances, the jury must receive and weigh it. They are bound to look upon it with suspicion and distrust, and may reject it. But, upon the other hand, they may, as they determine, accept as true one or the other of the contradictory asseverations. Thus, upon a review of the evidence by this tribunal, we may not examine with minuteness claims that witnesses are discredited, or that their evidence is unworthy of belief, or look to see whether some other conclusion might not have been warranted by the evidence. *Blythe v. Ayres*, 102 Cal. 254; 36 Pac. 522. "*Ad questionem juris respondeant iudices, ad questionem facti respondeant juratores*;" and than this no maxim of the old law has been more carefully preserved in its integrity under our system. Where it is not clear that the verdict must have been rendered under the influence of passion or prejudice, our examination of the record is only to determine whether legal evidence has been offered sufficient to warrant a conviction, for the verdict of the jury is their declaration that it is this evidence which has been by them accepted. *People v. Ah Loy*, 10 Cal. 301; *People v. Vance*, 21 Cal. 400; *People v. Strong*, 30 Cal. 151; *People v. Dick*, 32 Cal. 214; *People v. Manning*, 48 Cal. 335; *People v. Estrada*, 53 Cal. 600; *People v. Mayes*, 66 Cal. 597; 6 Pac. 691; *People v. Ah Juke*, 91 Cal. 98; 27 Pac. 595; *People v. Freeman*, 92 Cal. 359; 28 Pac. 261.

The following facts were presented in evidence:

Upon April 3, 1895, Blanche Lamont was living with her aunt, Mrs. Noble, in the city and county of San Francisco. She was in person rather tall and slight, and weighed about 120 pounds. Her age was twenty-one years. She was a school girl, attending the high school and normal school, and upon the morning of April 3d, left her home, with her strap of books, to join her classes. She met defendant while on the way (such is his testimony), and he accompanied her for a part of the journey. She was at school during the day's session, and at its close, about 3 p. m., left with the other pupils. She did not return home, and never after that day was seen alive. Shortly after 9 o'clock upon the morning of April 14th, two police officers and the janitor attempted to open the door

leading to the belfry of the Emmanuel Baptist Church. They were prosecuting a search for Blanche Lamont. The knob of the door was gone, and the lock mutilated, so that the janitor's key could not open it. They forced the door, and one of the officers, ascending the stairs, found the body of a girl lying on the top landing, in the southeastern corner of the belfry. It was that of Blanche Lamont. The body was naked, lying upon its back, the feet close together, the hands folded upon the breast, the head inclined a little to the left. There were two small blocks, apparently employed to hold the head in an upright position. Decomposition was well advanced, and, by medical testimony, life had been extinct for about two weeks. An examination and autopsy of the corpse revealed seven finger nail incisions upon the left side of the throat, and five upon the right, a depression of the larynx, and a congestion of the trachea, larynx, lungs, and brain. Strangulation was the cause of death. A search brought to light the clothing and apparel of the girl, hidden in and about the rough woodwork of the belfry, and also her book, strap and school books.

Upon April 15th the defendant was arrested, and charged with this murder. At that time, Durrant was a young man, twenty-four years of age, a student of the Cooper Medical College of San Francisco, and a member of the signal corps of the National Guard of the State. He was interested in religious work; was an attendant, if not a member, of the Emmanuel Baptist Church; was a member of the Christian Endeavor Society; was assistant superintendent of the Sunday school, and was librarian of the church library. As is abundantly testified to, he bore the esteem of his fellows as a zealous, earnest, and upright young man, of commendable character, and of sincere Christian life. When arrested, he was upon service of the signal corps to which he was attached. Upon the trial his defense was an *alibi*. He declared that he had seen Blanche Lamont in the morning of April 3d, when she was on her way to school, but never again thereafter; that he himself had gone to his medical college, and there had attended a lecture at the time when, under the contention of the prosecution, the girl had been by him murdered in the church. By the prosecution it was shown that Blanche Lamont was a regular attendant of Emmanuel Church, and belonged to the Society of Christian Endeavor, of which Durrant was also a member. The two

were well acquainted. Indeed, they seem to have stood in their intercourse upon terms of cordial and trusting friendship. They met at religious and social gatherings, to or from which Durrant frequently escorted the girl, in company with her sister and others of their social circle. Durrant had a key to the side door of the church, was thoroughly familiar with the building and premises, and frequently visited them.

Mrs. Mary Vogel lived across the street from the school which Blanche Lamont was attending. She saw defendant a little after 2 o'clock of the afternoon of April 3d in front of the schoolhouse, walking up and down, apparently in waiting. When school closed, she noticed two girls coming out together. One of them carried books in a strap. They walked to the corner of the street, where they stopped for a car. The defendant joined them as they were about to board it. One of the girls went inside. The other sat outside upon the dummy. The defendant joined this girl, and seated himself beside her. Minnie Edwards testified that it was she who accompanied Blanche Lamont from school that afternoon. They were joined by Durrant at the corner. Blanche Lamont and he sat together outside, while she found a seat within the car. Blanche Lamont had her school books with her. Mrs. Alice Dorgan, at the time of these occurrences, was a pupil of the same school. Upon that afternoon, she, too, saw Blanche Lamont upon the dummy in company with the defendant. May Lanigan, another of the school girls, also saw the two upon the dummy. This was from five to ten minutes after 3 o'clock. Mrs. Elizabeth Crossett had known the defendant for about four years. Between half past 3 and 4 o'clock of this afternoon, while she was upon a Valencia street car, traveling towards Twenty-fifth street, she saw defendant. He was seated upon the dummy of her car, in company with a young lady whom she did not know, but whose description answered to that of the murdered girl. The two were in conversation, and left the car at Twenty-first or Twenty-second street, and walked in the direction of Bartlett street. The Emmanuel Baptist Church is situated upon Bartlett street, between Twenty-second and Twenty-third streets. Martin Quinlan, between ten and twenty minutes after 4 o'clock of this afternoon, saw the defendant and a young lady, whose description corresponded to that of the girl, and who carried a loose package in her

hand by a string or strap, walking along Bartlett street, from Twenty-second street towards Twenty-third street. They were upon the same side of the street as the church, and were walking towards it. Mrs. Caroline Leake lived upon Bartlett street, almost directly opposite the church. She had been an attendant there at divine service for many years. She had known defendant for the past three or four years. She also knew Blanche Lamont. Between 4 and half past 4 of this afternoon, she saw Durrant and a young lady pass through the gate into the churchyard, and on toward the side door. His companion she could not identify positively, but from her appearance thought at the time that it was Blanche Lamont, or another young lady of similar size and height. This young lady testified that she was not with defendant at any time upon that day, and no pretense is made that she was. George King was a member of the church, and its organist. He knew defendant, and the two were very friendly. At 5 o'clock on this afternoon, he entered the church by the front door, letting himself in with his key. He noticed a strong smell of gas, and went forthwith to the library, to see if it was escaping there. He failed to find the leak. Thence, closing the library door, he proceeded directly to the Sunday school room, and, sitting at the piano, began to play. He played for two or three minutes, when defendant came through the folding doors to the rear, and stood looking at him. "I asked him what was the matter, because of his pale condition. He had his coat off, and his hat off. His hair was somewhat disheveled. He came through, and then told me that he had been fixing the gas above the auditorium, and had been overcome by it to such a degree that he could hardly descend the ladder. He seemed ill. He handed me a fifty-cent piece, and asked me to go and get some bromo seltzer." Witness procured the seltzer, and upon his return found the defendant either standing in the lobby or lying upon the platform in the Sunday school room. He thinks, however, that defendant was lying down. Defendant took a dose of the seltzer, which seemed to nauseate him somewhat. The two sat and talked together for a few minutes; then went up stairs to the choir loft, and carried down a small organ. Defendant appeared weak, and had to stop two or three times to rest. Then they went to the library door, which Durrant unlocked, and, enter-

ing, put on his hat and coat, which were lying on a box in the corner. Witness had not seen the hat or coat when he went into the library the first time that afternoon. They then left the church, and, walking some distance together, separated, and went to their respective homes. It was then about 6 o'clock.

Upon the morning of April 13th, ten days after the disappearance of Blanche Lamont, and one day before the discovery of her body, her aunt, Mrs. Noble, received through the mail, a package which contained all of the rings worn by her when she left her home. The rings were inclosed in a copy of a daily newspaper, the Examiner, and upon the paper were written the names of George King and Prof. Schernstein. King was a common friend of Durrant and Blanche Lamont. Prof. Schernstein was her music teacher. Neither of the two wrote the names. The paper and wrapper were exhibited to the jury, together with admitted exemplars of defendant's writing. Upon a morning between the 4th and 10th of April, Adolph Oppenheimer, a pawnbroker, was offered for sale a gold ring containing a diamond chip. The ring was identified as one worn by Blanche Lamont at the time of her disappearance, and subsequently returned to her aunt through the mail. The person offering the ring for sale was the defendant. William Phillips testified that, upon a day in the first part of April, he saw defendant standing in front of Oppenheimer's place, between 10 and 11 o'clock in the morning. Dr. G. F. Graham was a student and classmate of Durrant's at the Cooper Medical College. From 3:30 to 4:15 p. m. of April 3d, Dr. Cheney, of that college, delivered a lecture to his class upon the sterilization of milk. Dr. Graham attended that lecture, and took notes of it. The defendant, in support of his *alibi*, claimed to have attended the lecture, and likewise to have taken original notes, which were admitted in evidence. Dr. Graham testified that after Durrant's arrest, and before the trial, he visited him with a friend. Durrant requested his companion to withdraw, that he might talk to Dr. Graham alone. When he had done so, defendant informed Dr. Graham that he had no notes of the lecture, and requested the doctor to lend him his, saying that, if he could get them, he could establish an *alibi*. Defendant told him that he could take the notes to Durrant's house, get his book, and put them in it, and the book could be

brought to him in jail, or that the witness could commit his notes to memory, come to the jail, and repeat them to him.

This summarization of the evidence is not designed to be exhaustive. Much that is cumulative upon the part of the people is omitted. No analysis is made of the *alibi* of the defense, nor of the claim of the prosecution that, when not completely demolished, it stands upon the unsupported word of the defendant. Enough has been set forth to show that the verdict and judgment find support from legal and sufficient evidence, and, when that point is reached, the inquiry of this court comes to an end, saving in those exceptional cases (of which this is not one) where the evidence against the defendant is so slight as to make clear the inference that the verdict must have been rendered under the influence of passion or prejudice. *People v. Vance*, 21 Cal. 400; *People v. Manning*, 48 Cal. 335.

By this evidence, the defendant and Blanche Lamont (she with her strap of books) entered the Emmanuel Church at about half past 4 o'clock in the afternoon of April 3d. At 5 o'clock defendant is seen there, and explains his distressed condition as caused by the inhalation of gas. At 6 o'clock he leaves the church. Blanche Lamont is never again seen alive. Two weeks after, her nude and decomposing body is found in the church. She had been strangled and her corpse dragged to the belfry. The clothes which she wore on leaving home are secreted about the floors and rafters. Her books are found still tightly strapped. These facts, with the others set forth, are sufficient to justify the hypothesis of defendant's guilt, and to exclude every other reasonable hypothesis than that of his guilt. Such evidence is clearly sufficient to warrant and uphold the determination that the girl was strangled to death at the hands of the defendant upon the afternoon of April 3d. The evidence of defendant's previous good character, so fully established, was a circumstance making strongly in his favor. We are asked to say that the jury disregarded it in reaching their verdict, but this we can not do. They were fully and fairly instructed upon the matter, and it must be presumed that the instructions were regarded.

Appellant further urges that the evidence fails to disclose any motive for the crime; that proof of motive is essential to support a conviction; and that, therefore, the judgment must

be reversed. If by this is meant that proof of a particular motive must be as clear and cogent as proof of the crime, the proposition finds no support in either reason or authority. To the act of every rational human being pre-exists a motive. In every criminal case proof of the moving cause is permissible, and oftentimes is probable, but it is never essential. Where the perpetration of a crime has been brought home to a defendant, the motive for its commission becomes unimportant. Evidence of motive is sometimes of assistance in removing doubt, and completing proof which might otherwise be unsatisfactory; and that motive may either be shown by positive evidence, or gleaned from the facts and surroundings of the act. The motive then becomes a circumstance, but nothing more than a circumstance, to be considered by the jury; and its absence is equally a circumstance in favor of the accused, to be given such weight as it deems proper. But proof of motive is never indispensable to a conviction. *People v. Bennett*, 49 N. Y. 137; *Pointer v. U. S.*, 151 U. S. 396; 14 Sup. Ct. 410; *Johnson v. U. S.*, 157 U. S. 320; 15 Sup. Ct. 614; *Clifton v. State*, 73 Ala. 473; *Sumner v. State*, 5 Blackf. 579. The wellsprings of human conduct are infinite, and infinitely obscure. An act may owe its performance to complex and multitudinous promptings. Who

Knows each chord its various tone,
Each spring its various bias?

Or the deed may be due to a single dominant impulse. In this case, what the motive may have been it is not the province of this court to inquire.

During the impanelment of the jury, the defense made application for citations against certain newspaper editors, to show cause why they should not be punished for contempt because of their publications relative to the trial. The court refused to interrupt the proceedings to consider the matter then, and postponed action, stating that at a proper time it would, upon request, take such steps as might be contemplated by law. Again, during the impanelment of the jury, the application was renewed, and the court's response was the same. No further request was made, and there the matter was allowed to stand. This is urged as reversible error. While a contempt proceeding, for convenience, is presented in the cause out of which it grows, it is a separate and distinct mat-

ter, and no part of the original case. *Ex parte Ah Men*, 77 Cal. 198; 19 Pac. 380. Power to punish for contempt is vested in courts for their own protection. Its object is to insure respect for their rules and orders, obedience to their processes, and freedom from disturbance or interference with the due and regular course of their proceedings. 5 Am. & Eng. Enc. Law, p. 780; Thomp. Trials, Sec. 124. A publication during the course of a trial which reflects on the court, or assails the litigants, or seeks to intimidate witnesses, or spreads before the jury an opinion upon the merits of the controversy, or threatens them with public odium, or attempts to dictate the decision, or in any improper way endeavors to influence the determination, is unquestionably a contempt of court (*In re Shortridge*, 99 Cal. 532; 34 Pac. 227); but at the same time a litigant has no appeal from the action of the judge in dealing with the matter. The litigant may not control this process, which is designed for the protection of the court, and which is to be invoked or not, as its discretion may dictate, but which should be employed freely where the interests of justice and the rights of litigants demand it. "The doctrine is well nigh without exception that the issuance *vel non* of contempt proceedings lies in every instance in the sound discretion of the court." 4 Enc. Pl. & Prac., p. 774. If by the failure of the court to proceed against the editors or any of them, defendant has failed to obtain the fair and impartial trial to which the law entitles him, he may make that appear upon his motion for a new trial, and the question will thus come before us properly for review. In this case the question is raised in the manner indicated, and it will be considered upon its merits in the proper place.

Numerous objections were made and exceptions reserved to the court's rulings in admitting and rejecting evidence. These rulings have been subjected to critical examination, including those which in appellant's brief receive no discussion, but are grouped by number, and collectively assigned as error. While none, therefore, has been ignored, we will here consider only such as merit particular mention.

(a) Dr. Barrett was shown to be a practicing physician and surgeon. He performed the autopsy upon the body of the dead girl, gave evidence of its condition, and expressed his judgment that the cause of death was strangulation.

He was then asked, "What, in your judgment, was the means used for the strangulation?" Objection was made, upon the sole ground that no proper foundation had been laid for the question. The objection was properly overruled. The objection does not present the point that the fact sought to be elicited was not the subject of expert inquiry; nor is that proposition argued in the briefs. That being conceded, the objection that a proper foundation for the question had not been laid could not be sustained, when the witness was a physician and surgeon, whose competency had been abundantly shown. The witness answered: "I think the means used were hands." The appellant insists that the court erred in refusing to strike this answer out, as the question called for the witness' judgment, and he only gave his thought. The expressed thought of the expert was clearly his judgment.

(b) The clothing of Blanche Lamont, admitted in evidence, was draped upon a dressmaker's frame, which itself was not in evidence. It was not claimed that the frame represented the height, size, or figure of the girl. Error is predicated upon the use of the frame and the refusal of the court to order the garments removed from it. The frame afforded a convenient mode for displaying the wearing apparel, concerning which much testimony was taken. We can discern no more impropriety or irregularity in the plan pursued than would have existed if the garments had been hung upon a clothesline, or huddled into a corner.

(c) Mrs. Vogel, cross-examined by the defense, and asked how she fixed the date upon which she saw Durrant as being April 3d, replied that it was because of a postal card which her husband received that day, and which had been directed to 732 Natoma street. "That place we own, but is occupied by tenants. I have never lived there. Q. Well, is that your property or your husband's property? A. What he got is mine, what I got is his. Q. Do you understand my question? I asked you in whose name does the title to this property on Natoma street stand?" Here the judge interposed, and stating that he could see no possible materiality or relevancy to the question, instructed the witness that she need not answer. There was in this no error. Indeed, it is the duty of a court, and one not often enough performed, to expedite business by curtailing cross-examinations upon immaterial and irrelevant

matters. We can not perceive the slightest pertinency to the inquiry. No question of right or title to property was even collaterally or remotely involved, and had the witness answered, the subject being immaterial matter educed on cross-examination, the defense would have been bound by her statement, without right to impeach it, even had it been false. Code Civ. Proc., § 2048; *People v. McKeller*, 53 Cal. 65.

(d) Mrs. Crossett declared that, to the best of her recollection, the young lady whom she saw with defendant wore a broad-brimmed hat, light, with large bows and feathers in front. She did not recognize the hat exhibited to her, which had been proved to be the one worn by the dead girl. She was then asked: "Can you tell whether it was a hat similar to that, this young lady wore?" Objection was made that the witness had already stated that she could not recognize it. The court permitted the question, saying: "I think they have a right to ask whether there is any similarity, and if so, what similarity there is, between the hat shown to her and the hat she saw the young lady wear." The manifest soundness of the ruling renders comment unnecessary.

The same witness was interrogated on cross-examination as follows: "Q. Have you seen him [Durrant] at all since last September, 1894? A. Yes, sir. Q. That is, you imagine you have? Mr. Barnes: I object to the question. The court: That would not be proper. The lady is telling what she has seen. I do not think, when a lady says, 'I have seen him since September,' that counsel has a right to say, 'You imagine you did?' * * * It disconcerts the witness, and throws a very serious doubt upon the statement. You should have the right to cross-examine this witness and all other witnesses, but I do not concede that this is a proper way to do it. Mr. Deuprey: We will have to take an exception. The court: You have your exception, certainly, to every ruling of the court; but I say that this and all witnesses in this court are to be treated fairly. Mr. Deuprey: I did, sir, treat this witness fairly. The court: The court does not believe you have. Mr. Deuprey: I take an exception to the court's remarks." Upon this ruling and these remarks error is affirmed. It is the right of a witness to be protected from irrelevant, improper or insulting questions, and from harsh and insulting demeanor; to be detained only so long as the interests of justice require;

to be examined only as to matters legal and pertinent to the issue. Code Civ. Proc., § 2066. The protection which the Code thus affords to witnesses could be more often extended by judges with a salutary effect upon judicial proceedings. The witness (a lady) had testified courteously and positively that she had seen defendant after the date named. The interjection of counsel was not legitimate cross-examination, and justified the interposition of the court.

(e) Blanche Lamont's sister Maud was living with her at the time of her disappearance. She was shown a picture of Blanche taken about three years before the date of her testimony, and was asked whether or not the photograph was a fair representation of her sister as she was upon April 3d. Over objection and exception, she was permitted to answer. It is a general rule, without contradiction, that, where the photograph is shown to be a faithful representation of what it purports to reproduce, it is admissible as an appropriate aid to the jury in applying the evidence, and this is equally true whether the photograph be of persons, things, or places. Rice, Cr. Ev. p. 154; Whart. Cr. Ev. (9th Ed.), § 544; Thomp. Trials, § 869. The fact that the photograph was taken two or more years before the date of the girl's death did not justify its exclusion after the testimony of the sister that it fairly represented Blanche at the time of her disappearance.

(f) George E. King, upon direct examination for the people, testified that, when he returned to the church after buying the bromo seltzer for Durrant, he found him either standing in the lobby or lying on the platform in the Sunday-school room, but in which place he could not remember. For the purpose of refreshing his memory, the district attorney, over objection and exception by the defense, was permitted to read the following question and answer from the testimony of the same witness upon the preliminary examination in the police court: "Q. When you returned, what occurred then? A. I met Durrant in the vestibule of the church by the front door, and he took the seltzer, and took a dose of it. He went into the kitchen to do that." The witness responded: "I did so testify. I don't think that testimony was correct. In the cross-examination I was asked if he was not lying on the platform, and that created a doubt in my mind, and now I am not sure either way." The witness would have had the undoubted

right to have read his testimony given upon the examination for the purpose of refreshing his memory. Code Civ. Proc. § 2047. Such a transcript may at least be regarded as a private memorandum. *Reid v. Reid*, 73 Cal. 206, 14 Pac. 781. When a witness called by a party fails to testify to matters previously within his recollection, or gives evidence in apparent variance with that formerly given, it is not incumbent upon the party producing the witness to wait for the assaults of the cross-examination to expose seeming inconsistencies and discrepancies. While he may not impeach his witness (saving under certain exceptional circumstances), he may with propriety refresh his recollection, to the end that the witness and his present evidence may both be put fairly and in their proper light before the jury. The answer above quoted affords a good illustration of this. The witness admits the discrepancy between his former and his present testimony, and candidly explains it as arising from a doubt created by his former cross-examination. There was here no impropriety and no injury to defendant.

(g) The janitor of the church was asked upon direct examination if any one beside himself had a key to his room. He replied: "I have sometimes left my room door locked, and found it open. Therefore I conclude that some one had a key to it." The refusal of the court to strike this answer out is assigned as error, "because, by its nature, the answer only had a tendency to cloud the minds of the jury," and "necessarily injured the case of defendant." We are unable to perceive any force in these objections.

(h) The body of Blanche Lamont was found nude and supine, with a small wooden block upon each side of the head, apparently used to hold it in an upright position. Dr. Charles E. Farnum was called for the people, and testified that he was the demonstrator of anatomy at the Cooper Medical College, which defendant attended, and that wooden blocks were employed for purposes in relation to dead bodies. He was next asked: "For what purpose are they used?" Objection was made that the question was irrelevant, immaterial and incompetent for any purpose. The line of proof sought to be established by the prosecution was quite apparent. It was an endeavor to show, by the demonstrator of anatomy, under whom defendant was studying, some tech-

nical or peculiar use of wooden blocks in connection with dissecting room corpses, similar to the use made of blocks about the head of the body of the dead girl. The court could not foresee the answer, and properly overruled the objection; for, if the proposition could be established, it was clearly competent for the people to do so. In this, however, there was a signal failure. The answer disclosed no possible connection between the facts in the case of the dead girl and the custom of the dissecting room. While the question was pertinent, the answer thereto failed to furnish the required proof. It would unquestionably have been stricken out on motion of the defense. But no motion was made; doubtless because the answer not only worked no injury to the defense, but was an affirmative advantage to it.

The record next discloses the following question, objection, exception and answer: "Q. Let me put a hypothetical case to you for a moment: Suppose you had in your custody or care a body which had recently died, and it was still almost warm with life. You are acquainted with anatomy and surgery, and you know that in a certain length of time *rigor mortis* would set in, when the body and the members of the body would become stiff. Now, if you wanted to keep the head—the face and neck—in an upright position, in a straight position, not turned to one side or the other, what would you do in order to keep it in that position? Mr. Deuprey: We object to that, not as a hypothetical question involving any elements in this case. (Objection overruled; defendant excepts.) A. I would place it first in the position in which I wanted it, and if it did not remain there, I would prop it by supports in the desired position. * * * My last answer is what I, as an individual, would do." The objection, it will be noted, is not upon the ground that the inquiry is not a subject of expert evidence, but is based upon the one proposition "that the hypothetical question does not involve any elements in the case." In strictness, therefore, this consideration might begin and end with a disposition of the single ground of objection urged; and when it appears, as by fair inference it does, that some one had murdered the girl, and that some one was present with her still warm body, and that some one placed the blocks for the purpose of holding the head upright, it certainly can not be said that none of the elements of the case were involved in the hypo-

thetical question. Indeed, while counsel for the appellant, arguing this proposition, strenuously insist that "there is no evidence in the record that any person wanted to keep the head, the face or the neck in an upright or any position, or in a straight position, not turned to one side or the other; there was nothing in the way of circumstance or in the way of fact established that would permit the presumption of the conditions forced into the so-called 'hypothetical question,'"—we need but turn back four pages of their brief to find the curiously destructive declaration that "the fancy struck the murderer of this girl to place the head in a certain position, and he did the most natural thing in the world—picked up a couple of small blocks, evidently lying near, to hold the head in the position desired." Moreover, a hypothetical question need not embrace all the facts in evidence, or even be limited to facts proved. It must be based upon facts in evidence, but may be addressed to any reasonable theory which may be taken of them. In *Filer v. Railroad Co.*, 49 N. Y. 46, it is well said: "It is the privilege of counsel to assume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and base the opinion of experts upon the facts thus assumed. The facts are assumed for the purpose of the question, and for no other purpose." In Thompson on Trials (section 604) the rule is thus aptly and succinctly stated: "The rule, then, is that the hypothetical questions must be based either upon the hypothesis of the truth of all the evidence, or upon a hypothesis specially framed of certain facts assumed to be proved for the purpose of the inquiry. Such questions leave it for the jury to decide, in the first case, whether the evidence is true or not, and in the second case, whether the particular facts assumed are or are not proved."

But as in criminal cases, and particularly in cases of capital crime, the law is reluctant to deny a defendant a full consideration of his points because of technical errors or omissions of his counsel, upon whom he must rely, we pass to the consideration of the proposition that the hypothetical question and its answer were not the subject of expert evidence—a ground of objection not presented to the trial judge. Upon this proposition the defense is undoubtedly correct. A jurymen would be absolutely deficient in common sense and common knowledge who did not know that the way to keep an

inanimate object in a given position would be to support it by props or stays in that position. And the physician's answer gives expression to this when he says: "That is what I, as an individual, would do." There was here no question of professional, scientific, or technical skill or knowledge. But the question and answer were absolutely without injury. Not all matter improperly made the subject of expert evidence work harmful error. Where the ultimate conclusion is one to be reached by the jury itself from facts before it, and so-called "expert evidence" is allowed, which presents to a jury a conclusion other than that to which they might have arrived, the admission of this improper evidence is tantamount to a declaration by the court that they may set aside their exclusive right of judging, and accept the judgment of the expert. In such cases injury is apparent. But it frequently happens that under the form of expert evidence, answers are given which are so clearly a part of common knowledge that no injury could have resulted. The answer under consideration is one of them. Had the witness been asked: "If you throw a stone into a pond of water, will it float, or sink? If you strike a man on the head with an ax, will it injure or benefit him?"—while the questions do not call for expert evidence, their answers, particularly when as in this case, they are correctly given, could, in the nature of things, have worked no harm.

(2) The defense showed by Police Officer Reynolds that, two days after the discovery of the body, he found a chisel and hammer in the pastor's study in the church, and that he tried the chisel upon the marks. He testified: "My recollection is that there were two marks I tried to fit the chisel to. There was no mark that fitted it exactly. There was a little play. You could move the chisel up and down. I could not tell if there was any more play than would ordinarily have occurred in using a chisel for prying. * * * I saw a mark on the jamb of that door, as if at some time a blow had been struck with a hammer. * * * At some time the hammer was tried in that mark." The defense then introduced the hammer and chisel in evidence. The plain purport of this evidence was to direct suspicion to the minister. In rebuttal, the belfry door and jamb were offered in evidence by the prosecution, after testimony from the officer that they were in the same condition as when previously he had made the test, saving for the

absence of the lock plate. The evidence was permissible. The witness was then asked to see if he could fit the chisel to the marks. It was objected that it was for the jury to satisfy themselves upon this matter without the intervention of the witness. It is true, the jurors could have made the experiment to their satisfaction without the aid of the officer; but, he having testified to his former experiment, the prosecution was entitled to have him repeat it before the jury. The result would be, as the jury determined, either to support or to disprove his oral evidence.

(j) The defendant offered himself as a witness, and told with much circumstantiality and detail how he had spent his time upon April 3d. Many objections were interposed to questions propounded him upon cross-examination. A minute examination fails to disclose any error in the court's rulings. The questions allowed and the scope of the cross-examination are strictly within the rule expressed in *People v. Gallagher*, 100 Cal. 466, 35 Pac. 80. One or two of the rulings should, perhaps, receive more particular consideration.

The defendant testified upon direct examination that, when he parted with Blanche Lamont upon the morning of April 3d, it was the last time that he ever saw her, dead or alive, and was asked upon cross-examination if he had not prepared a statement which was put into a sealed envelope, addressed to his counsel, with the instruction: "To be opened if I am convicted, and to be returned unopened if I am not convicted." To this and several like questions objections were interposed, upon the ground that the statement, if made, was privileged. The court ruled, and properly, that the questions were preliminary. It was the fact, and not the contents of the statement, which was the subject of inquiry, and no effort was made to extort from the witness any information of the latter. The court further declared that, if the people failed to follow this preliminary inquiry by proper proofs, it would, on motion, strike out the evidence. The witness answered that he had made no such statement, and there the matter rested; presumptively to the advantage of the defendant, certainly not to his injury. From the fact that no motion was made to strike out the evidence, it must be concluded that defendant acquiesced in its remaining in the case. *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625. The court was further justified in

its ruling by the consideration that it could not foretell the line of proof which the people might take in rebuttal. The contents of the statement, while privileged matter between the client and attorney and all who had acquired knowledge of it through a relation of legal confidence, would not be privileged if known to one who had acquired his knowledge under other circumstances. The court could not know that it was not some such evidence which would be proposed at the proper time.

The prosecution then asked the witness, with specifications of time, place and circumstance, if he had not told Miss Carrie Cunningham that he saw Blanche Lamont upon the second landing, and that she was murdered upon the second landing. This was in rebuttal of defendant's testimony that he had never seen the girl after the morning of April 3d. It is argued by appellant's counsel that the communication, if made, was privileged. But considering that Miss Cunningham was a newspaper reporter, and is not shown to have been the wife or to have stood to the defendant in any other relation of legal confidence, the claim scarcely merits comment.

(k) Miss Cunningham, called in rebuttal, was asked whether defendant did or did not make to her the statement above mentioned. It is asserted that the allowance by the court of these questions was a "gross outrage," and "bore down to the ground all the rules of evidence." It was strictly rebuttal evidence, by way of impeachment, under well settled rules of law, and under the express declaration of section 2052 of the Code of Civil Procedure.

The foregoing are all of the alleged errors in receiving and rejecting evidence which call for especial comment.

It came to the knowledge of the court, during the progress of the trial, that one H. J. McCoy had said to a juror: "If you don't hang him (meaning defendant), we will hang you." For this flagrant contempt, McCoy was at once cited to appear. An examination was held. By this it was disclosed that the language was used jocularly, and without serious significance. At least so the juror to whom it was addressed testified that he received and understood it. For this contempt, McCoy was promptly and properly punished. The proceedings were conducted in the presence of the jury. This circumstance is now for the first time charged as error.

Doubtless, had the defense desired the jury excused during the investigation, the court would have acceded to the request but no such suggestion was made. We fail to see how the defendant could have been injured by this. The mode pursued, we think, had a salutary, rather than malign, effect. The claim that defendant could have been prejudiced in the minds of the jury is completely answered by the facts—First, that it was not the defense which either instituted or conducted the contempt proceedings; and, second, by the affirmative declarations of each of the jurors under oath that he reached his verdict from a consideration of the evidence in the case, and from that alone.

We perceive no abuse of his office or unfairness to defendant in the argument of the district attorney. In showing an empty box to illustrate the amount of gas which, under the evidence, would leak in a given time, both the district attorney and the judge were careful to inform the jury that the box was not an exhibit; that no proof of its capacity was before them; and that they were not to accept the district attorney's statement as evidence. The box was used simply for purposes of illustration, and, while the practice is not commended, its exhibition to the jury could have worked no injury in this case under the cautions of the court, and, in strictness, could no more be regarded as error than would have been the like employment of any ordinary object in the court room.

Error is assigned for the court's refusal to give certain instructions proposed by the defense, in number 36. Argument is addressed to but few of them. These will be considered. The others not argued have not been overlooked, but they either contain manifest errors of law, or are so completely covered by those given of the court's own motion that it may with safety be concluded that counsel's failure to discuss them is a tacit recognition that as to them no error was committed.

Of the proposed instructions, No. 6 was refused because substantially given in the charge of the court. It was so given.

No. 8 deals with the danger to be avoided and the caution to be exercised in reaching a conclusion upon circumstantial evidence. Upon this subject, also, the jury was fully and fairly advised by the court.

The propositions of law contained in the first portion of No. 10 were given by the court with more elaboration and

exactness than appear in the proposed instruction. It was not error for the court to decline to give the last portion. It is quite true that the law never requires the sacrifice of a victim. But the jurors had been carefully instructed as to their duties, and had been repeatedly told that unless, upon clear and cogent proof, satisfying their minds beyond a reasonable doubt, they believed defendant guilty, it was their duty to acquit him. It was not incumbent upon the court to instruct the jury, as matter of law, that "it is safer to err in acquitting." There is not in contemplation of law any such factor of safety for error.

Proposed instructions 11-16, upon the subject of *alibi*, were fully embraced in those given by the court, as was also the law upon the matter of identification. Of the remaining instructions the same may be said.

It may here be noted that the appellant does not make serious complaint that any of the instructions actually given by the court were erroneous in point of law, but contends that in some instances the propositions which he sought to have laid before the jury were not adequately presented. The jury, however, was ably, carefully, and elaborately instructed and we can discern no just ground of complaint in this regard.

The grounds for a new trial presented by defendant have for the most part been covered by what has been said. One of them, however, still remains for consideration. This is that the proceedings were so conducted as to deprive defendant of his constitutional right to a fair and impartial trial. Under this head it is urged that, by the repeated publications in the newspapers of San Francisco, public feeling was unjustly aroused to bitter hostility against the defendant; that witnesses who would otherwise have given valuable testimony in his favor were so intimidated that either they refused to testify, or, in testifying, gave colorless and worthless evidence; and that the jury itself, impelled by fear, yielded to the public clamor and demand that the defendant should be convicted. Many hundreds of pages of the transcript are given over to a presentation of the newspaper articles complained of.

The murder of Blanche Lamont was a crime of so atrocious a character that the community was greatly aroused. Its ghastly and sensational features were seized upon with avidity by the newspapers, and daily paraded and exploited before their horrified readers. When Durrant was arrested for the

crime, there was no reservation of judgment upon their part, but they proceeded with unanimity to hold him up to the public as the guilty man. During the trial of the case they vied with each other in sensational discoveries and prophecies concerning new evidence and strange witnesses. They maintained throughout the attitude which they originally assumed, and from first to last continued to treat defendant as the undoubted criminal. All this the record presented by appellant abundantly establishes. But when a community is deeply stirred over the commission of some appalling crime, and the public and the public prints are clamoring that punishment shall be meted out for it, unless we must say that, under such circumstances, as matter of law, a defendant can not have the trial guaranteed him by the constitution, such a showing does not conclude the question. Under these circumstances, all men do not forsake reason; some still preserve a dispassionate judgment; and if it be made to appear that the defendant was tried by a jury of such, uninfluenced by aught save the evidence, then in this regard none of his rights has been violated. After rigorous examination by prosecution and defense, it appears that such a jury was obtained without exhausting more than three-fifths of defendant's peremptory challenges. Each juror makes solemn affidavit that he did not at any time during the trial of the cause, and while he was impaneled and sworn as a juror, read or hear read any of the articles, statements or comments published in any of the newspapers concerning this case; that he at all times heeded the admonition of the court given at each adjournment thereof, and was at no time influenced in any way, shape or manner by any extraneous matter whatever while a juror, either by newspapers, conversations, or public sentiment, if any such sentiment existed; that he received no impression as to the defendant's guilt or innocence outside of the court room, but decided the case, after deliberation, solely according to the law and the evidence, to the best of his ability and understanding, and not otherwise. It can not be said that there was any error in refusing a new trial under such a showing.

The claim that witnesses for the defense were intimidated and kept from testifying, is not supported. It was expected to prove by a witness (Clark) that in the afternoon of April 3d he saw, upon a Market street car, Blanche Lamont, with

a young man, not the defendant. Clark was in one of the eastern states during the trial, and his deposition was there taken. It was to the effect that he saw Blanche Lamont and a young man, not answering the description of defendant, together upon a car upon a day in the latter part of March or the first part of April, but the date he could not fix with positiveness. He said that he believed that he had told a lawyer that it was upon April 3d, but that subsequent consideration had convinced him that he was mistaken in this. There is here no suggestion of undue influence or intimidation.

The witness Lenahan, called by the defendant, testified, from all that appears, precisely as the defense expected.

Mrs. Monnier, it is said, was expected to testify that, upon the afternoon of April 3d, she saw a young man whom she would identify as defendant enter the Emmanuel Church alone; that, because of newspaper publications and interviews with her, her husband became afraid that his business would be injured, and, between fear and anger, so talked with, and influenced his wife, "that she became uncertain as to the time." This declaration is made upon the information and belief of defendant. It is not supported or corroborated. Even the source of affiant's information is not mentioned. It does not appear that Mrs. Monnier was not at all times within reach of process; yet no attempt was made to introduce her testimony. This showing is certainly insufficient to call for a reversal of the case.

Upon a consideration of the whole case, we discern no error to the prejudice of any of the substantial rights of defendant; wherefore the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; TEMPLE, J.; VAN FLEET, J.

McFARLAND, J. (concurring). I have signed the opinion of Mr. Justice HENSHAW, and thereby concurred in his opinion and in the judgment of affirmance. But while I can see no legal ground for a reversal of the judgment, I desire to say that the conviction of appellant would have been much more satisfactory if he had been tried in some county far beyond the reach of the threatening atmosphere which surrounded him at the place of his trial, and where the active and long-continued attempts to forestall judicial inquiry, and compel a hostile

decision, could not possibly have had much force. As the case stands, it is somewhat difficult to feel sufficiently assured that outside adverse pressure did not have some insensible influence. But whether or not appellant had a substantially fair trial, notwithstanding circumstances which certainly made it difficult for him to have such a trial, is a question which addressed itself, in the first instance, to the presiding judge of the trial court; and it is not so apparent that he abused his discretion in determining that question in the affirmative as to give this court warrant to reverse the order denying a new trial. As to the other points involved in the appeal, I am clear that no substantial error was committed.

Rehearing denied. BEATTY, C. J., dissenting from the order denying a rehearing.

PEOPLE V. DURRANT. (Two cases. Cr. 308, 358.)

(51 Pac. R. 185.)

MURDER: *Continuance—Discretion—Fixing date of execution—Appeal—Stay of execution.*

1. Where defendant, for delay only, objects to submitting a case for hearing before the time for filing briefs has expired, and no substantive right of defendant would be prejudiced by thus submitting the case, the objection is without merit.
2. Where defendant had two attorneys, and they were notified of a hearing to be had, and one of them was absent, it was not error to refuse a continuance of the hearing, where defendant is duly represented by one of his counsel, and the questions desired to be raised by the absent counsel have been finally adjudicated on appeal.
3. Where a judgment of death has not been executed when directed to be, and defendant has been called into court to show cause why another date for execution should not be fixed, it is not error for the court to refuse to inquire into the validity of the judgment by which defendant was convicted, nor a violation of the Penal Code, as amended in 1891, providing for the fixing of a date for the execution of a judgment of death after the date originally fixed has expired.
4. It is not error, in fixing punishment for murder, to direct, as a part of the judgment, that defendant be kept in close confinement in the penitentiary until the day set for the execution.
5. When a trial court refuses a certificate of probable cause, the proper remedy is to renew the application therefor before one or more of the justices of the supreme court.
3. An order fixing the date of execution is an order made after final judgment, affecting the substantial rights of defendant, and is appealable.

7. An appeal from an order fixing the time for execution does not stay the execution without a certificate of probable cause, and defendant may be executed pending the appeal where such certificate is not secured.
8. In making an application for a certificate of probable cause to the supreme court, it is ordinarily essential that there should be a settled bill of exceptions presented to the court before the certificate will be granted.
9. It is error to order execution of defendant at a date within the time allowed by statute for an appeal from the order, and the time allowed for preparing and settling a bill of exceptions, preparatory to an application to the supreme court for a certificate of probable cause, in case such certificate should be refused by the trial court.
10. Where an order is made fixing the time of execution of defendant at a date which renders the preparation and presentation of a bill of exceptions to the supreme court, in an application for a certificate of probable cause, impossible, the order is void on its face, and justifies the issuance of a certificate without a bill of exceptions.

GAROUTTE, J., dissenting.

In banc. Appeal from Superior Court, City and County of San Francisco; Hon. George H. Bahrs, Judge.

W. H. T. Durrant, having been convicted of murder, prosecutes several appeals from several orders fixing the date of execution. The People moved to dismiss. The motion and appeal were heard together. Motion denied. First appeal affirmed. Second appeal reversed.

For principal case see page 499, *ante*.

Eugene N. Deuprey, John H. Dickinson and Louis P. Boardman, for appellant.

Attorney-General Fitzgerald, for the People.

BEATTY, C. J. Two appeals entitled and numbered as above are pending in this court. Each is from an order of the superior court fixing a day for carrying into execution a sentence of death. The case is this: The defendant was convicted of murder in the first degree by a verdict involving the extreme penalty. He appealed from the judgment and from an order denying his motion for a new trial, but the judgment and that order were affirmed. 116 Cal. 179; 48 Pac. 75. Upon the going down of the *remittitur* an order was made by the superior court requiring the sheriff of the county to produce the body of the defendant in that court on the 10th day of April, 1897. On that day, the defendant and his counsel being present in court, he was informed by the court of the previous proceed-

ings in the cause, and asked to state any legal reasons he might have why the court should not make an order fixing a time for carrying into execution the judgment theretofore pronounced against him. His objections having been heard and overruled, an order was made directing his delivery within ten days to the warden of the state prison at San Quentin; the said warden keep him in close confinement in said prison until Friday, the 11th day of June, on which day, between sunrise and noon, the warden was commanded to execute him by hanging. From this order the defendant immediately took the appeal first above entitled. The transcript of the record was filed in this court on May the 8th, but that was too late to admit of a submission and decision of the cause, under the rules of the court, before the day appointed for the execution. Neither the people nor the defendant asked for an order to expedite the hearing, but the defendant applied to the justices for a certificate of probable cause for his appeal, which, if granted, would have had the effect of staying the execution. No justice of the court was, however, willing to certify that there was any probable cause for the appeal, and the execution would have taken place except for a *habeas corpus* proceeding instituted in the Circuit Court of the United States in behalf of the defendant. His petition for a writ of *habeas corpus* was denied by the circuit court, but his appeal to the Supreme Court of the United States was allowed, the effect of which was to stay all proceedings under the judgment and order of the state court. Pending the proceedings in the federal courts, by consent of all parties, the hearing of this appeal was continued from term to term until it was finally submitted at Sacramento in November. Matters being in this posture, and the announcement having been made by telegraph that the Supreme Court of the United States had dismissed the defendant's appeal in the *habeas corpus* proceeding, the superior court, on the 9th day of November, made an order requiring the sheriff to produce the body of the defendant in court on the following day, to enable the court to inquire into the facts, and to determine whether any legal reasons existed why the judgment of death should not be executed. In obedience to this order the defendant was brought into court on the 10th day of November, and in the presence of his counsel again informed of the previous proceedings in the cause, and required to state

any legal reason he might have why a date should not be fixed for his execution. In response to this demand, the defendant offered in evidence certified copies of the proceedings in the circuit court upon his application for a writ of *habeas corpus*, from which it clearly appeared that his appeal to the supreme court had been regularly allowed and perfected, and that no *remittitur*, mandate or order had been received from the supreme court showing any disposition of that appeal. To this showing by the defendant no counter-showing whatever was made on the part of the people. The defendant, by his counsel, thereupon objected to any further action by the court for want of jurisdiction—First, by reason of the pendency of the appeal in the *habeas corpus* proceeding in the Supreme Court of the United States; and, second, by reason of the appeal pending in this court from the order of April 10, 1897. The defendant also made other objections, which need not be stated here. All these objections were overruled, and the court, on the 10th day of November, made an order directing the execution of the defendant on the 12th of November, between sunrise and noon. From this order the defendant immediately appealed, but his bill of exceptions was not settled before the 18th, perhaps not before the 22d of November, *i. e.*, from six to ten days after the time when the order commanded his execution. In the meantime, however, the supreme court being in session at Sacramento, counsel for defendant proceeded to that place, and on the afternoon of the 11th day of November laid before the justices a copy of the order of November 10th, and of some of the proceedings in the superior court, certified by the county clerk, upon which he petitioned for a certificate of probable cause for his appeal, which was immediately granted by the concurrence of six out of the seven justices, and certified to the warden of San Quentin in time to prevent the execution. A transcript of the record on this appeal—which is the second above entitled—was filed in this court on December 2d. On December 6th the attorney-general, upon notice to counsel for defendant, moved to dismiss both appeals upon the ground that the days, respectively, fixed by the orders appealed from for carrying the sentence of death into execution having passed, the orders were no longer of any force, and the questions involved were mere moot questions, not calling for further consideration by the court. But

the court being of the opinion that the appeals ought not to be dismissed (*People v. McNulty*, 95 Cal. 594, 30 Pac. 963), and that there were some important points of practice involved which ought to be settled by a speedy decision, intimated that opinion from the bench, whereupon the attorney-general offered to submit the second appeal (the first, as stated above, was submitted in November) upon a confession of error in the order appealed from, and asked an early decision in both cases. Counsel for appellant, notwithstanding the confession of error which necessarily involved the granting of all the relief which they seek by their appeal, viz., the reversal of the order appealed from, objected to the submission of the second appeal, contending that under the rules of the court the case must go upon the calendar after the regular time for filing briefs, and be orally argued before the court prior to any decision.

This objection is without merit. The rules for making up the calendar and filing briefs are designed to expedite, not to delay, the decision of causes, and are framed with a view of giving all parties ample opportunity to be heard before their causes are decided against them. If there were any substantive right of appellant to be prejudiced by an immediate submission of his appeal, his objection would not be unreasonable; but since the attorney-general has confessed error, and conceded that the order appealed from must be reversed, and since it is legally impossible that the appellant can ever have any other or greater relief than a reversal of the order, it is manifest that his objection is interposed only for the purpose of delay. We shall therefore consider and decide both appeals together.

It is not necessary to discuss the objections raised upon the first appeal at any length, but they will be briefly noticed:

First. From the beginning of the proceedings in the superior court the defendant had the assistance of two members of the bar as counsel, E. N. Deuprey and J. H. Dickinson. During a portion of the trial Mr. Deuprey was absent on account of sickness. On the 10th day of April, when the defendant was required to show cause why a day for his execution should not be fixed, Mr. Dickinson was absent, and Mr. Deuprey moved for a continuance upon that ground. It was shown that Mr. Dickinson had received due notice of the time and place fixed for the hearing of the motion of the people to fix

the date of execution. His absence, under the circumstances, would not have made the granting of a continuance compulsory, even if his presence could have been of any advantage to the defendant. But it could not, for the defendant was represented by his other counsel, Mr. Deuprey, who was entirely competent, notwithstanding his absence during a portion of the trial, to represent the defendant on this motion. His plea for delay was based upon the suggestion that Gen. Dickinson, from his greater familiarity with the proceedings, was better able than himself to present some matters connected with the trial and affecting the validity of the judgment. But since the judgment and order denying a new trial had just been affirmed in this court, and a rehearing denied, it is clear that the validity of the judgment was past question in the superior court. The court did not err in refusing a continuance.

Second. It is next contended that the court "erred in refusing to inquire into the facts of the record, and in refusing to have proof made of the condition of the record, and the fact upon which the court might act in the premises as provided by law." I state this objection in the language of counsel. The point of it, as I gather from the briefs, is that the court erred in not calling the clerk of the court, and taking his testimony under oath as to the existence and identity of the record of the judgment in the case of *People v. Durrant*, then remaining in that court, and just before finally affirmed in this court. It is contended that the failure to do this was a violation of the provisions of section 1227 of the Penal Code as amended in 1891. That section reads as follows: "If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction is had, on the application of the district attorney of the county in which the conviction is had, must order the defendant to be brought before it, or if he is at large, a warrant for apprehension may be issued. Upon the defendant being brought before the court it must inquire into the facts, and if no legal reasons exist against the execution of the judgment, must make an order that the warden of the state prison to whom the sheriff is directed to deliver the defendant shall execute the judgment at a specified time. The warden must execute the judgment accordingly." The facts which this section requires the court to inquire into, relate exclusively to the question whether

there are any legal reasons against the execution of the judgment, as, for instance, a pardon or commutation of sentence by the executive. Of the existence of the judgment and its legal effect the court takes judicial notice. The identity of the defendant with the prisoner before the court might, under conceivable circumstances, become a question of fact; but no such question arose in this case, nor any other as to which the court was bound to take testimony. The judgment was within the judicial knowledge of the court, and the prisoner was before the court, and the burden was on him to show, if he could, that any legal cause existed against executing the judgment. The court did not err in this matter.

Third. It is contended that not only the order of April 10, 1897, but the original judgment also are void, because each contained an explicit direction that the defendant should be kept in close confinement at San Quentin by the warden of that prison from the time of his delivery thereat until his execution. This was a question involved in the original appeal, and so far as the judgment is concerned, was thereby concluded. However, if the objection possessed any merit, it might be pressed—as it is—against the order of April 10th. But it has no merit. It may be true that a direction to keep the defendant in close confinement has no proper place in the judgment, but if so, it is simply superfluous and harmless. In the absence of such a direction, it would be the duty of the warden, under the statute, to keep the prisoner closely confined in the designated prison. Pen. Code, §§ 1217-1227. Close confinement does not mean solitary confinement in the technical sense of that expression, but only secure confinement within the prison walls. Nor is the order or judgment void because it imposes a double punishment. It is conceded that imprisonment in the penitentiary pending execution does add something to the punishment prescribed by the law of the state for the crime of murder prior to the amendments of 1891. It was so held in both of the opinions delivered by this court sitting in banc in the McNulty case (*People v. McNulty*, (Cal.) 28 Pac. 816; *People v. McNulty*, 93 Cal. 427; 26 Pac. 597, and 29 Pac. 61), which was decided upon the controlling authority of *Medley*, Petitioner, 134 U. S. 160; 10 Sup. Ct. 384. And for this reason only it was held in the first decision (reported in 28 Pac. 816), that the law, being made applicable by its terms

to homicides committed before as well as after its passage, was *ex post facto* and void. The second opinion (reported in 93 Cal. 427; 29 Pac. 61), retracted nothing that was decided on this point in the first, but the law was held constitutional because after the first decision a general saving clause in the Political Code was brought to our attention which confined its application to offenses committed subsequent to its passage, leaving prior offenses to be governed by the old law. It is therefore a point settled, so far as the deliberate opinion of this court can settle it, that imprisonment in the penitentiary pending execution is a distinct part of the punishment for murder prescribed by our law. But the law has nevertheless been held valid as to all murders committed since its enactment. The only objection ever made to it heretofore was that it was *ex post facto*. Freed of that objection by the construction it received in the McNulty case, it has been hitherto supposed to be unobjectionable, and has been enforced in numerous instances. There is no restriction upon the power of the legislature to prescribe double, treble or any number of punishments for an offense, except that they must not be cruel and unusual, and must not be applied *ex post facto*. There is nothing cruel or unusual in close confinement in the penitentiary, and as to this case there is no pretense that the law is *ex post facto*.

Fourth. The court did not err in refusing a certificate of probable cause, and if it had done so, the remedy is not by appeal, but by renewing the application before a justice or justices of this court, which was the course actually taken, with the result above stated.

This disposes of all the points involved in the first appeal, and shows that the certificate of probable cause was properly denied, and that the order should stand affirmed.

In the second appeal the confession of error renders it unnecessary to discuss the points to be ruled in defendant's favor, and improper, perhaps, to discuss any which might have been ruled against him. Our reasons for reversing the order were, we thought, sufficiently stated in the opinion filed November 11, 1897, setting forth the grounds upon which we granted the certificate of probable cause. 50 Pac. 1070. But it seems that upon one point we failed to make ourselves entirely clear. We said that an order fixing the date of defendant's execution

within the time allowed him by statute to present his bill of exceptions was a violation of his rights and a gross abuse of discretion. We did not have time in making that order to elaborate the proposition stated, and, since the point of practice is important, we take the present occasion to make it plainer if we can. An order fixing the date of execution is "an order made after final judgment affecting the substantial rights of the defendant," and as such is appealable. Pen. Code, Sec. 1237, subd. 3; *People v. Sprague*, 54 Cal. 92; *People v. McNulty*, 95 Cal. 594; 30 Pac. 963. But the appeal does not stay the execution without a certificate of probable cause (*People v. McNulty, supra*), and therefore the defendant may be executed pending his appeal if he fails to secure such certificate. This being so, it is of vital importance that the defendant should not be deprived of the means provided by the statute for obtaining a stay. Among those means is an application to the justices of the supreme court in case the certificate is refused by the judge of the superior court. Pen. Code, Sec. 1243; in *Re Adams*, 81 Cal. 165; 22 Pac. 547. In order to make the application to a justice of the supreme court, it is ordinarily essential that there should be a settled bill of exceptions, for by no other means can a judge who did not conduct the proceeding eventuating in the order appealed from know whether there are grounds for the appeal or not. The defendant, then, being by law entitled to his appeal, and entitled to a stay of proceedings pending his appeal, if any justice of the supreme court will grant him a certificate of probable cause and a settled bill of exceptions being in most cases an essential prerequisite to his application to the justices of the supreme court, to deprive him of any opportunity of getting a bill of exceptions before the justices of the supreme court is to deprive him of his plain legal right in a matter of the highest moment, and if that is not error it would be difficult to say what error consists in. In this case the defendant was not only deprived of the ten days' time which the statute gives him to present his bill of exceptions, and of the further reasonable time necessary for its settlement and presentation to the justices of the supreme court, but he was deprived absolutely of any opportunity to go before that court with any properly authenticated record of the proceedings. The justices of the supreme court being at Sacramento, if but a single day had

been taken to settle the bill of exceptions and furnish a certified copy it would have been impossible to have presented the record to the justices, obtained the order, and made regular service on the warden before the hour of execution had passed. This made the order erroneous upon its face, without the aid of a bill of exceptions, and justified the issuance of the certificate of probable cause, regardless of the other point discussed in our opinion, which was not and could not be brought regularly before us.

It has been suggested that the action of some of the justices in refusing the petition of Ebanks for a certificate of probable cause was inconsistent with these views. It is true that Ebanks was ordered to be executed in eight days from the date of the order, which was therefore erroneous; but a bill of exceptions was promptly presented and settled and certified by the judge of the superior court on the day following the order, so that when the petition for a certificate of probable cause was presented it was supported by a duly authenticated copy of the record which showed that the defendant had been deprived of no legal right except the full time allowed by the statute for presenting his bill of exceptions, and that error he had cured by his own act. There was therefore no prejudice in the error and no ground for a reversal.

The motions to dismiss are denied. The order in case No. 308 is affirmed. The order in case No. 358 is reversed, and the cause remanded to the superior court, with directions to proceed according to law. It is further ordered that the *remittitur* issue forthwith.

We concur: HENSHAW, J.; TEMPLE, J.; MCFARLAND, J.; HARRISON, J.

GAROUTTE, J. (concurring). The attorney-general having confessed error in the second appeal, and there being no merit whatever in the first appeal, I concur in the judgment that the first order appealed from be affirmed, and that the second order appealed from be reversed.

GAROUTTE, J. (dissenting). There are two appeals pending before this court from orders made by the trial judge fixing the day for the execution of Theodore Durrant. The particular

day fixed for the execution in each order has long since gone by. The attorney-general now moves this court to dismiss those appeals upon the ground that the orders from which they were taken have ceased to have any force and effect whatever; that the questions raised thereby are no longer living questions; and that any decision rendered upon them could not possibly affect the rights of the defendant. In other words, it is insisted that by the mere lapse of time the appeals present nothing but moot questions. This position of the attorney-general is eminently sound, and the appeals should be dismissed. Their decision upon the merits could do neither the defendant nor the people any possible good, and, under such circumstances, our time should be devoted to matters more substantial and material. In the *McNulty Case*, 95 Cal. 594, 30 Pac. 963, the court refused to dismiss an appeal from an order similar to those here involved, but there the day fixed for the execution had not expired when the motion was made. Hence that case has no bearing here. Some question is made by appellant upon these appeals to the effect that the orders were erroneous because they provided for close confinement of the defendant by the warden until the day of the execution. But this contention has no force now, for the reason that such period of close confinement ceased when the day of execution passed by. So that portion of these orders is doing the defendant no injury, even conceding it erroneous. He has served his full time of close confinement under these orders, rightfully or wrongfully, and a decision of these appeals would in no way affect the matter. The case stands exactly as though a party should serve a sentence of 100 days in jail, and afterward appeal from the judgment of conviction. The court would refuse to hear such an appeal upon the ground that there was no live material issue before it. The foregoing principles of law are fully supported by numerous decisions of this court, and I rest the matter with a single citation. In *Foster v. Smith*, 115 Cal. 611, 47 Pac. 591, the syllabus correctly declares the principle of the decision as follows: "Where a temporary injunction was granted to restrain a stockholder from voting at an election of the directors of a corporation, * * * and such injunction was dissolved prior to the election, an appeal taken from the order dissolving the injunction after the election had been held raises only an abstract ques-

tion and will be dismissed." In the body of the opinion it is said: "It thus appears that the parties to the litigation have no rights which can be affected by a reversal of the order, and that the correctness of the order has become merely an abstract question." And, again: "If the order should be reversed, the Superior Court would have no function to perform in consequence of such reversal." Upon sound reason the same principle necessarily applies to criminal cases. I see no material and substantial purpose to be subserved by a dismissal of these appeals. As the case now stands, there is no legal reason, to my knowledge, why the trial court should not take steps to enforce its judgment. Yet such relief is asked by the attorney-general, and I see no possible objection to granting it. I dissent from the order refusing to dismiss the appeals.

BRAM V. UNITED STATES.

(18 Sup. Ct. R. 183.)

MURDER: *Evidence—Confessions—Statements to police officer—Indictment—Affirmation by grand juror—Circumstantial evidence—Expert evidence.*

1. Objections and exceptions taken both when a witness is offered to prove a confession, and also after he has been examined as to the circumstances under which the confession was made, are sufficient to raise the question in the Appellate Court, though the objection is not renewed after the witness has testified to the confession.
2. In determining whether the proper foundation was laid for the admission of evidence offered as a confession, the reviewing court is not concerned as to how far the evidence tends to prove guilt. If illegally admitted, reversible error results, since the prosecution, after securing the admission of evidence as a confession, will not be heard to assert that it does not tend to prove guilt.
3. Whenever a question arises in the federal courts as to whether a confession is incompetent because not voluntary, the issue is controlled by the declaration in the fifth amendment to the constitution that no person "shall be compelled in any criminal case to be a witness against himself;" this being the constitutional embodiment of the doctrine of the inadmissibility of involuntary confessions.
4. To render a statement offered as a confession admissible, the rule is not that the proof must establish that the particular communications contained in the statement were voluntarily made, but it must establish that the making of the statement was voluntary; that is to say,

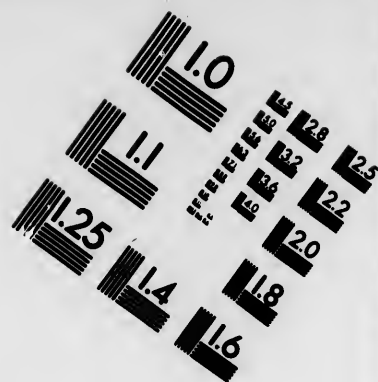
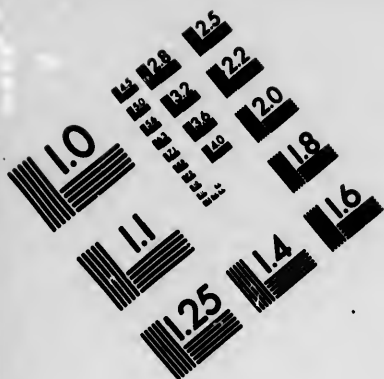
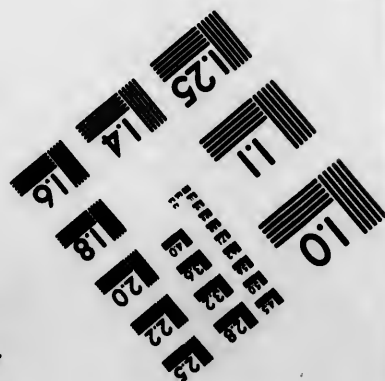
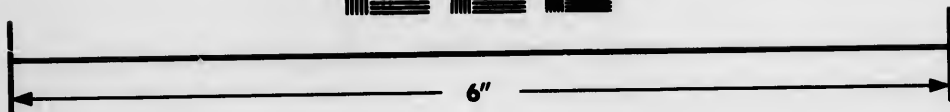
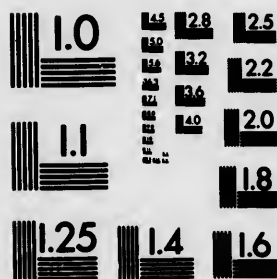


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- that, from causes which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, he was not involuntarily impelled to make a statement when, but for the improper influence, he would have remained silent.
5. The mere fact that a confession is made to a police officer while the accused is under arrest, in or out of prison, or is drawn out by his questions, does not necessarily render the confession involuntary; but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not the statement was voluntary.
 6. Statements offered as a confession of murder *held* inadmissible where it appeared that they were made to a police officer, in the latter's office, no other persons being present, after the prisoner had been stripped of his clothing, and after the officer had said to him that his co-suspect had made a statement that he saw him commit the deed; that the officer was satisfied that the prisoner had killed the deceased; that it was thought that he could not have done it alone, and, if he had an accomplice, he should say so, "and not have the blame of this horrible crime on your own shoulders."
 7. An objection that an indictment recited that it was presented "upon the oath" of the grand jurors, when in fact it was presented upon the oath of all but one, who affirmed instead of making oath, is a merely formal defect, without prejudice, which is cured by the provisions of Rev. Stat. § 1025.
 8. An objection that neither in the indictment nor in the proof at the hearing of pleas in abatement did it affirmatively appear that a grand juror, who was permitted to affirm instead of making oath, had conscientious scruples against taking an oath, is without merit, in view of the curative provisions of Rev. Stat. § 1025, and in view of the fact that the mode of ascertaining the existence or non-existence of such scruples is committed to the discretion of the officer who affirmed the juror.
 9. Where the evidence is purely circumstantial, it is proper for the prosecution to show, as a circumstance in the case, the fact that another person, who was in the vicinity at the time of the killing, could not have committed the crime. The fact that such testimony might operate indirectly to fortify the credit of such person as a witness could not affect its admissibility.
 10. A question asked of a medical expert as to whether, in his opinion, a man standing at the hip of a recumbent person, and striking blows on his head and forehead with an ax, would necessarily be spattered or covered with blood, *held* to have been properly admitted; the assumed state of facts being warranted by the proofs.

Mr. Chief Justice FULLER, Mr. Justice BREWER, and Mr. Justice BROWN, dissenting.

In error to the Circuit Court of the United States for the District of Massachusetts.

Asa P. French and James E. Cotter, for plaintiff in error.
Assistant Attorney-General Boyd, for the United States.

Mr. Justice WHITE delivered the opinion of the court.

This writ of error is prosecuted to a verdict and sentence thereon, by which the plaintiff was found guilty of murder, and condemned to suffer death. The homicide was committed on board the American ship Herbert Fuller, while on the high seas, bound from Boston to a port in South America. The accused was the first officer of the ship, and the deceased, of whose murder he was convicted, was the master of the vessel. The bill of exceptions, after stating the sailing of the vessel from Boston on the 2d of July, 1896, with a cargo of lumber, gives a general summary of the facts leading up to and surrounding the homicide, as follows:

"She had on board a captain, Charles I. Nash; Bram, the defendant; a second mate, August W. Blomberg; a steward, and six seamen; also the captain's wife, Laura A. Nash, and one passenger, Lester H. Monks.

"The vessel proceeded on her course toward her port of destination until the night between July 13th and July 14th. On that night, at twelve o'clock, the second mate's watch was relieved by the mate's watch, of which Bram, the defendant, was the officer in charge. The captain, his wife, the passenger, Monks, and the first mate and the second mate, all lived in the after cabin, occupying separate rooms. * * * The crew and the steward slept forward in the forward house.

"When the watch was changed at midnight, Bram, the defendant, took the deck, the seamen Loheac and Perdok went forward on the lookout, and Charles Brown (otherwise called Justus Leopold Westerberg, his true name) took the wheel, where it was his duty to remain till two o'clock, at about which time he was relieved by Loheac. The second mate went to his room, and the seamen of his watch to their quarters at twelve, midnight, and there was no evidence that any of them or the steward appeared again until daylight.

"The passenger, Monks, who occupied a room on the starboard side of the cabin, between the chart room where the captain slept and the room on the forward starboard side where Mrs. Nash slept, with doors opening from the passenger's room into both the chart room used by the captain as his room and that of Mrs. Nash, was aroused not far from two o'clock (the exact time is not known, as he says) by a scream, and by another sound, characterized by him as a gurgling sound. He arose,

went to the captain's room, and found the captain's cot overturned, and the captain lying on the floor by it. He spoke, but got no answer; put his hand on the captain's body, and found it damp or wet. He then went to Mrs. Nash's room; did not see her, but saw dark spots on her bedding, and suspected something wrong. He went on deck, and called the mate, the defendant, telling him the captain was killed. Both went below, took down the lantern hanging in the main cabin, burning dimly, turned it up, and went through the captain's room to the passenger's room, and the passenger there put on a shirt and pantaloons. They then both returned to the deck, the mate on the way stopping a brief time in his own room. Bram and Monks remained talking on deck till about daybreak, when the steward was called, and told what had happened. Up to this time no call had been made for the second mate, nor had any one visited his room. Later it was found that Captain Nash, his wife and Blomberg, the second mate, were all dead, each with several wounds upon the head, apparently given with a sharp instrument, like an ax, penetrating the skull and into the substance of the brain; and the second mate lying on his back, with his feet crossed, in his berth; Mrs. Nash in her bed, in her room, and at the back side of the bed; and Captain Nash in his room, as already stated.

"The whole crew was called at or about daylight, and were informed of the deaths.

"The bodies were removed from the cabin, and placed in the jolly boat, and the boat was towed astern to Halifax. The cabin was then locked, Bram taking the keys, and it remained locked till the vessel reached Halifax.

"At first, after the discovery of the murders, there was some hesitancy as to where the vessel should go. At the defendant's suggestion, she was headed to go to Cayenne, in French Guiana; but the plan was changed, and she steered for Halifax, Nova Scotia, where she arrived July 21st, and was taken possession of by the local authorities, at the instance of the consul general of the United States.

"At first, after the discovery of the murders, Bram, on whom had devolved the command of the ship, made Brown chief mate and Loheac second mate.

"No blood or spots of blood were ever discovered on the person or the clothing of any person on board, nor did anything direct suspicion to any one.

"In a day or two, suspicion having been excited in respect to the seaman Brown, the crew, under the supervision of Bram, seized him, he not resisting, and put him in irons. All the while the officers and seamen remaining on deck. Bram navigated the ship until Sunday before they reached Halifax; on Tuesday, and after the land of Nova Scotia was in sight, when, Brown having stated to his shipmates, or some of them, that he saw into the cabin through a window in the after-part and on the starboard side of the house, and saw Bram, the mate, kill the captain. In consequence of this statement of Brown, the crew, led by the steward, suddenly overpowered the mate, and put him in irons, he making no resistance, but declaring his innocence. Bram and Brown were both carried into Halifax in irons."

The bill of exceptions further states that when the ship arrived at Halifax, the accused and Brown were held in custody by the chief of police at that place, and that, while in such custody, the accused was taken from prison to the office of a detective, and there questioned, under circumstances to be hereafter stated. Subsequently to this occurrence at Halifax, all the officers, the crew, and the passenger were examined before the American consul, and gave their statements, which were reduced to writing and sworn to. They were thereafter, at the request of the American consul, sent to Boston, where the accused was indicted for the murder of Nash, the captain, of Mrs. Nash, and the second mate, Blomberg. The trial and the conviction now under review related to the first of these charges. The errors which are here assigned as grounds for reversal are more than sixty in number, and are classified by the counsel for the accused as follows: (a) questions raised preliminary to the trial; (b) questions raised during the trial; (c) questions raised in connection with two motions for a new trial.

We first examine the error relied on which seems to us deserving of the most serious consideration. During the trial, a detective, by whom the accused was questioned while at Halifax, was placed upon the stand as a witness for the prosecution, for the purpose of testifying to the conversation had between himself and the accused at Halifax, at the time and place already stated. What took place between the accused and the detective at the time of the conversation, and what

occurred when the witness was tendered in order to prove the confession, is thus stated in the bill of exceptions:

"Nicholas Power, of Halifax, called by the government, testified that he was connected with the police department of Halifax, and had been for thirty-two years, and for the last fifteen years of that time as a detective officer; that after the arrival of the Herbert Fuller at Halifax, in consequence of a conversation with Charles Brown, he made an examination of Bram, the defendant, in the witness' office, in the city hall at Halifax, when no one was present besides Bram and the witness. The witness testified that no threats were made in any way to Bram, nor any inducements held out to him.

"The witness was then asked: 'What did you say to him and he to you?'

"To this the defendant's counsel objected. The defendant's counsel was permitted to cross-examine the witness before the court ruled upon the objection, and the witness stated that the conversation took place in his office, where he had caused the defendant, Bram, to be brought by a police officer; that up to that time the defendant had been in the custody of the police authorities of Halifax, in the custody of the superintendent of police, John O'Sullivan; that the witness asked that the defendant should be brought to his office for the purpose of interviewing him; that at his office he stripped the defendant, and examined his clothing, but not his pockets; that he told the defendant to submit to an examination, and that he searched him; that the defendant was then in custody, and did everything the witness directed him to do; that the witness was then a police officer, acting in his official capacity; that all this took place before the defendant had been examined before the United States consul; and that the witness did not know that the local authorities had at that time taken any action, but that the defendant was held for the United States—for the consul general of the United States.

"The witness answered questions by the court as follows:

"'You say there was no inducement to him in the way of promise or expectation of advantage?

"'A. Not any, your honor.

"'Q. Held out?

"'A. Not any, your honor.

"'Q. Nor anything said in the way of suggestion to him

that he might suffer if he did not—that it might be worse for him?

“A. No, sir; not any.

“Q. So far as you were concerned, it was entirely voluntary?

“A. Voluntary, indeed.

“Q. No influence on your part exerted to persuade him one way or the other?

“A. None whatever, sir; none whatever.”

“The defendant then renewed his objection to the question what conversation had taken place between Bram and the witness, for the following reasons: That, at the time, the defendant was in the custody of the chief of police at Halifax; that the witness, in an official capacity, directed the police authorities to bring the defendant as a prisoner to his private office, and there proceeded to take extraordinary liberties with him. He stripped him. The defendant understood that he was a prisoner, and he obeyed every order and direction that the witness gave. Under these circumstances, the counsel submitted that no statement made by the defendant while so held in custody, and his rights interfered with to the extent described, was a free and voluntary statement, and no statement as made by him bearing upon this issue was competent.

“The objection was overruled, and the defendant excepted on all the grounds above stated, and the exceptions were allowed.

“The witness answered as follows:

“‘When Mr. Bram came into my office, I said to him: “Bram, we are trying to unravel this horrible mystery.” I said: “Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.” He said: “He could not have seen me. Where was he?” I said: “He states he was at the wheel.” “Well,” he said, “he could not see me from there.” I said: “Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,” I said “some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.” He said: “Well, I think, and many others on board the ship

think, that Brown is the murderer: but I don't know anything about it." He was rather short in his replies.

"Q. Anything further said by either of you?

"A. No; there was nothing further said on that occasion."

"The direct examination of this witness was limited to the interview between the witness and the defendant, Bram.

"On cross-examination of the witness Power, he testified that, at the time of the above-stated examination, he took possession of a pair of suspenders belonging to the defendant, and kept the same in his office until the prisoners were coming to Boston (the whole crew and the passengers were imprisoned at Halifax, and sent as prisoners to Boston), when he handed them over to the Halifax superintendent of police, and they were sent to Boston, with other property of the defendant.

"Defendant's counsel, upon the ground of showing interest on the part of the witness, then asked: 'What other articles belonging to the defendant did you take possession of at that time?'

"This line of inquiry was objected to by the district attorney, on the ground that the matter was not opened on the direct examination, and the defendant could call the witness as part of his case if he saw fit. The court excluded the inquiry, ruling that it was not proper cross-examination, and did not tend to show interest, and the defendant duly excepted, and the exception was allowed."

The contention is that the foregoing conversation, between the detective and the accused, was competent only as a confession by him made; that it was offered as such; and that it was erroneously admitted, as it was not shown to have been voluntary. The question thus presented was manifestly covered by the exception which was taken at the trial. When it was proposed to examine the detective officer as to the conversation had by him with the accused, objection was duly made. The court thereupon allowed the officer to be examined and cross-examined as to the circumstances attending the conversation which it was proposed to offer as a confession. When this examination was concluded, the accused renewed his objection, and his exception to the admissibility of the conversation was allowed, and regularly noted. The witness then proceeded to give the conversation. To say that under these circumstances the objection which was twice presented

and regularly allowed should have been renewed at the termination of the testimony of the witness would be pushing to an unreasonable length the salutary rule which requires that exceptions be taken at the trial to rulings which are considered erroneous, and the legality of which are thereafter to be questioned on error. There can be no doubt that the manner in which the exception was allowed and noted fully called attention to the fact that the admission of the conversation was objected to because it was not voluntary, and the overruling of this objection is the matter now assigned as error here. Indeed, in the argument at bar no contention was made as to the sufficiency and regularity of the exception. It is manifest that the sole ground upon which the proof of the conversation was tendered was that it was a confession, as this was the only conceivable hypothesis upon which it could have been legally admitted to the jury. It is also clear that, in determining whether the proper foundation was laid for its admission, we are not concerned with how far the confession tended to prove guilt. Having been offered as a confession, and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution can not, on the one hand, offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand, for the purpose of avoiding the consequence of the error caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial, because it did not tend to prove guilt. The principle on the subject is thus stated in a note to section 219 of Greenleaf on Evidence: "The rule excludes not only direct confessions, but any other declaration tending to implicate the prisoner in the crime charged, even though, in terms, it is an accusation of another or a refusal to confess. *Rex v. Tyler*, 1 Car. & P. 129; *Rex v. Enoch*, 5 Car. & P. 539. See further, as to the object of the rule, *Rex v. Court*, 7 Car. & P. 486, per Littledale, J.; *People v. Ward*, 15 Wend. 231." Nor from the fact that in *Wilson v. U. S.*, 162 U. S. 621, mention was made of the circumstance that the statement of the accused was a mere denial of guilt, accompanied with exculpatory explanations, does the decision in that case conflict with the principle we

have just stated. ' The ruling there made that error to the prejudice of the accused did not arise from the admission of the statement there considered was based, not alone upon the nature of the statement, but upon "the evidence of its voluntary character, the absence of any threat, compulsion, or inducement, or assertion or indication of fear, or even of such influence as the administration of an oath has been supposed to exert." 162 U. S. 624, 16 Sup. Ct. 900.

The contradiction involved in the assertion that the statement of an accused tended to prove guilt, and therefore was admissible, and then, after procuring its admission, claiming that it did not tend to prove guilt, and could not therefore have been prejudicial, has been well stated by the Supreme Court of North Carolina. (*State v. Rorie* [1876], 74 N. C. 148):

"But the state says this was a denial of guilt, and not a confession. It was a declaration which the state used to procure a conviction; and it is not for the state to say the declaration did not prejudice the prisoner's case. Why introduce it at all unless it was to lay a foundation for the prosecution? The use which was made of the prisoner's statement precludes the state from saying that it was not used to his prejudice."

In criminal trials, in the courts of the United States, whenever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment to the constitution of the United States commanding that no person "shall be compelled in any criminal case to be a witness against himself." The legal principle by which the admissibility of the confession of an accused person is to be determined is expressed in the text books.

In 3 Russ. Crimes (6th Ed.), 478, it is stated as follows:

"But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. * * * A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law can not measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted."

And this summary of the law is in harmony with the doctrine as expressed by other writers, although the form in which they couch its statement may be different. 1 Greenl. Ev. (15th Ed.), § 219; Whart. Cr. Ev. (9th Ed.), § 631; 2 Tayl. Ev. (9th Ed.), § 872; 1 Bish. New Cr. Proc., § 1217, par. 4.

These writers but express the result of a multitude of American and English cases, which will be found collected by the authors and editors, either in the text or in notes, especially in the ninth edition of Taylor, second volume, tenth chapter, and the American notes following page 588, where a very full reference is made to decided cases. The statement of the rule is also in entire accord with the decisions of this court on the subject. *Hopt v. Utah* (1883), 110 U. S. 574; 4 Am. Cr. R. 417; *Sparf v. U. S.* (1895), 156 U. S. 51, 55, ante, 168; *Pierce v. U. S.* (1896), 160 U. S. 355, 16 Sup. Ct. 321; and *Wilson v. U. S.* (1896), 162 U. S. 613.

A brief consideration of the reasons which gave rise to the adoption of the fifth amendment, of the wrongs which it was intended to prevent, and of the safeguards which it was its purpose unalterably to secure, will make it clear that the generic language of the amendment was but a crystallization of the doctrine as to confessions, well settled when the amendment was adopted, and since expressed by the text writers and expounded by the adjudications, and hence that the statements on the subject by the text writers and adjudications but formulate the conceptions and commands of the amendment itself. In *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, attention was called to the intimate relation existing between the provision of the fifth amendment securing one accused against being compelled to testify against himself, and those of the fourth amendment protecting against unreasonable searches and seizures; and it was in that case demonstrated that both of these amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change. In commenting on the same subject in *Brown v. Walker*, 161 U. S. 596, 16 Sup. Ct. 647, the court, speaking through Mr. Justice Brown, said:

"The maxim, '*Nemo tenetur seipsum accusare*,' had its origin

in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English Criminal Procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly imbedded in English as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law; so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."

There can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was imbedded in that system as one of its great and distinguishing attributes.

In *Burrowes v. High Commission Court* (1616), Bulst. 49, Lord Coke makes reference to two decisions of the courts of common law as early as the reign of Queen Elizabeth, wherein it was decided that the right of a party not to be compelled to accuse himself could not be violated by the ecclesiastical courts.

Whatever, after that date, may have been the departure in practice from this principle of the common law (Tayl. Ev., § 886), certain it is that, without a statute so commanding, in *Fellon's Case* (1628), 3 How. State Tr. 371, the judges unanimously resolved, on the question being submitted to them by the king, that "no such punishment as torture by the rack was known or allowed by our law."

Lord Hale died December 25, 1676. In the first volume of his *Pleas of the Crown* (1st Ed., p. 1736), treating of the subject of confessions in cases of treason, it is said, at page 304 :

"That the confession before one of the privy council or a justice of the peace being voluntarily made, without torture, is sufficient as to the indictment on trial to satisfy the statute, and it is not necessary that it be a confession in court; but the confession is sufficient if made before him that hath power to take an examination."

In the second volume, at page 225, it is said :

"When the prisoner is arraigned, and demanded what he saith to the indictment, either he confesseth the indictment, or pleads to it, or stands mute, and will not answer.

"The confession is either simple, or relative in order to the attainment of some other advantage.

"That which I call a simple confession is, where the defendant, upon hearing of his indictment, without any other respect confesseth it, this is a conviction; but it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead. 27 Assiz. 40.

"If it be but an extrajudicial confession, though it be in court, as where the prisoner freely tells the fact, and demands the opinion of the court whether it be felony, though upon the fact thus shown it appear to be felony, the court will not record his confession, but admit him to plead to the felony 'not guilty.' 22 Assiz. 71, and Stamf. P. C. lib. 2, c. 51, fol. 142b."

In chapter 38 of volume 2, at page 284, after referring to the power of justices of the peace and coroners, under the statutes of Philip and Mary, to take examinations of accused persons, but not upon oath, and that the same might be read in evidence on the trial of the prisoner, it is said :

"But then (1) oath must be made either by the justice or coroner that took them, or the clerk that wrote them; that they

are the true substance of what the informer gave in upon oath, and what the prisoner confessed upon his examination.

"(2) As to the examination of the prisoner, it must be testified that he did it freely, without any menace or undue terror imposed upon him; for I have known the prisoner disown his confession upon his examination, and hath sometimes been acquitted against such his confession. * * *"

Gilbert, in his treatise on Evidence (2d Ed., published in 1760), says, at page 139:

"* * * But, then, this confession must be voluntary and without compulsion; for our law in this differs from the civil law; that it will not force any man to accuse himself; and in this we do certainly follow the law of nature, which commands every man to endeavor his own preservation; and therefore pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on."

In Hawkins' Pleas of the Crown (6th Ed., by Leach, published in 1787, bk. 2, c. 31), it is said:

"Sec. 2. * * * And where a person upon his arraignment actually confesses he is guilty, or unadvisedly discloses the special manner of the fact, supposing that it doth not amount to felony where it doth, yet the judges, upon probable circumstances, that such confession may proceed from fear, menace or duress, or from weakness or ignorance, may refuse to record such confession, and suffer the party to plead not guilty."

In section 3, c. 46, it is stated that examinations by the common law before a secretary of state or other magistrate for treason or other crimes not within the statutes of Philip and Mary, and also the confession of the defendant himself in discourse with private persons, might be given in evidence against the party confessing. A note (2) to this section, presumably inserted by the editor (see note to *Gilham's Case*, 1 Moody, 194, 195), reads as follows:

"The human mind, under the pressure of calamity, is easily seduced, and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or

by the impressions of fear, however slightly the emotions may be implanted (*vide* O. B. 1786, p. 387), is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction."

Although the English reports, prior to the separation, are almost devoid of decisions applying the principles stated by Lord Hale, Hawkins and Gilbert, both the opinion of Lord Mansfield in *Re v. Rudd* (1775), Cowp. 333, and that of Mr. Justice Wilson, some years after the separation, in *Lambe's Case* (1791), 2 Leach (4th Ed.) 552, make it certain that the rule as stated by Hawkins, Gilbert and Hale was considered in the English courts as no longer open to question, and as one of the fundamental principles of the common law. Looking at the doctrine as thus established, it would seem plainly to be deducible that as the principle from which, under the law of nature, it was held that one accused could not be compelled to testify against himself, was in its essence comprehensive enough to exclude all manifestations of compulsion, whether arising from torture or from moral causes, the rule formulating the principle with logical accuracy came to be so stated as to embrace all cases of compulsion which were covered by the doctrine. As the facts by which compulsion might manifest itself, whether physical or moral, would be necessarily ever different, the measure by which the involuntary nature of the confession was to be ascertained was stated in the rule, not by the changing causes, but by their resultant effect upon the mind, that is, hope or fear, so that, however diverse might be the facts, the test of whether the confession, as voluntary, would be uniform, that is, would be ascertained by the condition of mind which the causes ordinarily operated to create. The well-settled nature of the rule in England at the time of the adoption of the constitution and of the fifth amendment, and the intimate knowledge had by the framers of the principles of civil liberty which had become a part of the common law, aptly explain the conciseness of the language of that amendment. And the accuracy with which the doctrine as to confessions as now formulated embodies the rule existing at common law, and imbedded in the fifth amendment, was noticed by this court in *Wilson v. U. S.*, *supra*, where, after referring to the *criteria* of hope and fear, speaking through Mr. Chief Justice Fuller, it was said: "In short, the true test

of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort." 162 U. S. 623, 16 Sup. Ct. 899.

In approaching the adjudicated cases for the purpose of endeavoring to deduce from them what *quantum* of proof, in a case presented, is adequate to create, by the operation of hope or fear, an involuntary condition of the mind, the difficulty encountered is that all decided cases necessarily rest upon the state of facts which existed in the particular case, and therefore furnish no certain criterion, since the conclusion that a given state of fact was adequate to have produced an involuntary confession does not establish that the same result has been created by a different, although somewhat similar, condition of fact. Indeed, the embarrassment which comes from the varying state of fact considered in the decided cases has given rise to the statement that there was no general rule of law by which the admissibility of a confession could be determined, but that the courts had left the rule to be evolved from the facts of each particular case. 2 Tayl. Ev., § 872. And, again, it has been said that so great was the perplexity resulting from an attempt to reconcile the authorities that it was manifest that not only must each case solely depend upon its own facts, but that even the legal rule to be applied was involved in obscurity and confusion. *Green v. State*, 88 Ga. 516; 15 S. E. 10; *State v. Patterson*, 73 Mo. 695, 705; *State v. Matthews*, 66 N. C. 106, 109.

The first of these statements but expresses the thought that whether a confession was voluntary was primarily one of fact, and therefore every case must depend upon its own proof. The second is obviously a misconception, for, however great may be the divergence between the facts decided in previous cases and those presented in any given case, no doubt or obscurity can arise as to the rule itself, since it is found in the text of the constitution. Much of the confusion which has resulted from the effort to deduce from the adjudged cases what would be a sufficient *quantum* of proof to show that a confession was or was not voluntary has arisen from a misconception of the subject to which the proof must address itself. The rule is not that, in order to render a statement admissible, the proof must be adequate to establish that the particular communications contained in a statement were vol-

untarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that, from causes which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement when but for the improper influences he would have remained silent. With this understanding of the rule, we come to a consideration of the authorities.

By statutes enacted early in the second half of the sixteenth century (1 & 2 Phil. & M. c. 13, and 2 & 3 Phil. & M. c. 10), justices of the peace were directed, on accusations of felony, to "take the examination of the said prisoner and information of them that bring him." In 1655, the judges directed that the examination of prisoners should be without oath (Kel. 2), and the reason of this rule, Starkie (Ev., 2d Ed., p. 29) says, was that an examination under oath "would be a species of duress, and a violation of the maxim that no one is bound to criminate himself." The ruling of the judges in this regard was recognized in the statute of 7 Geo. IV, c. 64, which, although requiring "information of witnesses" to be "upon oath," simply directed an "examination" of the accused.

But, even where the examination was held without oath, it came to be settled by judicial decisions in England that, before such an examination could be received in evidence, it must appear that the accused was made to understand that it was optional with him to make a statement. *Reg v. Green*, (1833), 5 Car. & P. 322; *Reg v. Arnold* (1838), 8 Car. & P. 621. The reason upon which this rule rested undoubtedly was that the mere fact of the magistrate's taking the statement, even though unaccompanied with an oath, might, unless he was cautioned, operate upon the mind of the prisoner to impel him involuntarily to speak. The judicial rule as to caution was finally embodied into positive law by the statute of 11 & 12 Vict., c. 42, where, by section 18, the magistrate was directed, after having read or caused to be read to the accused the depositions against him, to ask the accused: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in

writing, and may be given in evidence against you upon your trial."

The English courts were frequently called upon to determine whether language used by a magistrate when about to take the examination of one accused tended to induce in the mind of the latter such hope or fear as to lead to involuntary mental action. In *Reg. v. Drew* (1837), 8 Car. & P. 140, and *Reg. v. Harris* (1844), 1 Cox Cr. Cas. 106, though the accused had been cautioned not to say anything to prejudice himself, the further statement, in substance, by the magistrate or his clerk, that what the prisoner said would be taken down, and "would" be used for or against him at his trial, was held by Coleridge, J., to be equivalent to saying that what the prisoner chose to say might be used in his favor at the trial, and to be a direct inducement to make a confession, rendering the statement incompetent as evidence. Like rulings were also made in cases where similar assurances that the statement of the prisoner would be used were made to him by a police officer. *Reg. v. Morton* (1843), 2 Moody & R. 514, and *Reg. v. Furley* (1844), 1 Cox Cr. Cas. 76.

In cases where statements of one accused had been made to others than the magistrate upon an examination, differences of opinion arose among the English judges as to whether a confession made to a person not in a position of authority over the accused was admissible in evidence after an inducement had been held out to the prisoner by such person. *Rex v. Spencer* (1837), 7 Car. & P. 776. It was finally settled, however, that the effect of inducements must be confined to those made by persons in authority (*Reg. v. Taylor* (1839), 8 Car. & P. 734; *Reg. v. Moore* (1852), 2 Denison Cr. Cas. 522), although, in the last cited case, while former precedents were followed, the court expressed strong doubts as to the wisdom of the restriction (2 Denison Cr. Cas. 527). There can be no question, however, that a police officer, actually or constructively in charge of one in custody on a suspicion of having committed crime, is a person in authority within the rule; and, as this is so well established, we will not consider the adjudicated cases in order to demonstrate it, but content ourselves with a reference to the statement on the subject made in 3 Russ. Crimes, at page 501.

Many other cases in the English reports illustrate the appli-

cation of the rule excluding statements made under inducement improperly operating to influence the mind of an accused person.

In *Rex v. Thompson* (1783), 1 Leach (4th Ed.) 291, a declaration to a suspected person that, unless he gave a more satisfactory account of his connection with a stolen bank note, his interrogator would take him before a magistrate, was held equivalent to stating that it would be better to confess, and to have operated to lead the prisoner to believe that he would not be taken before a magistrate if he confessed. Baron Hotham, after commenting upon the evidence, in substance said that the prisoner was hardly a free agent at the time, as, though the language addressed to him scarcely amounted to a threat, it was certainly a strong invitation to the prisoner to confess, the manner in which it had been expressed rendering it more efficacious.

In *Cass' Case* (1784), 1 Leach, 293, a confession induced by the statement of the prosecutor to the accused, "I am in great distress about my irons. If you will tell me where they are, I will be favorable to you," was held inadmissible. Mr. Justice Gould said that the slightest hopes of mercy held out to a prisoner to induce him to disclose the fact was sufficient to invalidate a confession.

In the cases following, statements made by a prisoner were held inadmissible, because induced by the language set out in each case: In *Rex v. Griffin* (1809), Russ. & R. 151, telling the prisoner that it would be better for him to confess. In *Rex v. Jones*, Id. 152, the prosecutor saying to the accused that he only wanted his money, and, if the prisoner gave him that, he might go to the devil, if he pleased. In *Rex v. Kingston* (1830), 4 Car. & P. 387, saying to the accused: "You are under suspicion of this, and you had better tell all you know." In *Rex v. Enoch* (1833), 5 Car. & P. 539, saying: "You had better tell the truth, or it will lie upon you, and the mango free." In *Rex v. Mills* (1833), 6 Car. & P. 146, saying: "It is no use for you to deny it, for there is the man and boy who will swear they saw you do it." In *Sherrington's Case* (1838), 2 Lewin Cr. Cas. 123, saying: "There is no doubt, thou wilt be found guilty: It will be better for you if you will confess." In *Rex v. Thomas* (1833), 6 Car. & P. 353, saying: "You had better split, and not suffer for all of them."

In *Rex v. Simpson* (1834), 1 Moody, 410, and *Ryan & M.* 410, repeated importunities by neighbors and relatives of the prosecutor, coupled with assurances to the suspected person that it would be a good deal worse for her if she did not, and that it would be better for her if she did confess. In *Rex v. Upchurch* (1836), 3 Moody, 465, saying: "If you are guilty, do confess. It will perhaps save your neck. You will have to go to prison. If William H. (another person suspected, and whom the prisoner had charged) is found clear, the guilt will fall on you. Pray tell me if you did it." In *Rex v. Croydon* (1846), 2 Cox Cr. Cas. 67, saying: "I dare say you had a hand in it. You may as well tell me all about it." In *Reg. v. Garner* (1848), 1 Denison Cr. Cas. 321, saying: "It will be better for you to speak out."

In *Reg. v. Fleming* (1842), Arms., M. & O. 330, statements of a police officer suspected of having committed a crime, in answer to questions propounded by his superior in office, after the latter had warned the accused to be cautious in his answers, were held inadmissible. The court said: "The prisoner and witness being both on the police force, the prisoner, as the witness admitted, might have conceived himself bound to tell the truth; and the caution was not of that nature which should make the confession of the prisoner admissible."

In the leading case of *Reg. v. Baldry* (1852), 2 Denison Cr. Cas. 430, after full consideration, it was held that the declaration made to a prisoner, who had first been cautioned that what he said "would" be used as evidence, merely reported that such statement "might" be used, and could not have induced in the mind of the prisoner a hope of benefit sufficient to lead him to make a statement. The cases of *Reg. v. Drew*, *Reg. v. Harris*, *Reg. v. Morton*, and *Reg. v. Farley*, heretofore referred to, were held to have been erroneously decided.

In the course of the argument, counsel for the prisoner cited and commented upon *Cass' Case*, *Rex v. Thomas*, *Sherington's Case* and *Rex v. Enoch*, also heretofore referred to, as illustrating the doctrine that assuring the accused that it would be better for him to speak, or other intimation given of possible benefit, would invalidate a confession thus induced. After counsel had concluded his reference to these cases, Pollock, C. B., said (page 432): "There is no doubt as to the

application of the rule in those cases, which are all familiar to the judges and to the bar."

In the course of the opinion, subsequently delivered by him, Chief Baron Pollock said (page 442):

"A simple caution to the accused to tell the truth, if he says anything, it has been decided not to be sufficient to prevent the statement made being given in evidence; and although it may be put that, when a person is told to tell the truth, he may possibly understand that the only thing true is that he is guilty, that is not what he ought to understand. He is reminded that he need not say anything, but, if he says anything, let it be true. It has been decided that that would not prevent the statement being received in evidence, by Little-*dale, J.*, in the case of *Rex v. Court*, 7 Car. & P. 486, and by *Rolfe, B.*, in a case at Gloucester *Reg. v. Holmes*, 1 Car. & K. 258; but where the admonition to speak the truth has been coupled with any expression importing that it would be better for him to do so, it has been held that the confession was not receivable, the objectionable words being that it would be better to speak the truth, because they import that it would be better for him to say something. This was decided in the case of *Reg. v. Garner*, 1 Denison Cr. Cas. 329. The true distinction between the present case and a case of that kind is that it is left to the prisoner a matter of perfect indifference whether he should open his mouth or not."

In *Reg. v. Moore* (1852), 2 Denison Cr. Cas. 523, also decided by the court of criminal appeal, an admonition to a person suspected of crime that she "had better speak the truth," was held not to vitiate a subsequent confession, because not made by a person in authority. *Parke, B.*, delivering the opinion of the judges, said, in substance, page 526, that one element in the consideration of the question whether a confession ought to be excluded was "whether the threat or inducement was such as to be likely to influence the prisoner," and "that if the threat or inducement was held out, actually or constructively, by a person in authority, it can not be received, however slight the threat or inducement."

In *Reg. v. Cheverton* (1862), 2 Falc. & F. 833, a statement made by a policeman to a person in his custody, that "you had better tell all about it; it will save you trouble," was held to operate as a threat or inducement sufficient to render what was said by the prisoner inadmissible.

In *Reg. v. Fennell* (1881), 7 Q. B. Div. 147, the court for crown cases reserved referred approvingly to the statement of the rule contained in Russell on Crimes, and, "upon all the decided cases," held inadmissible a statement made, induced by the prosecutor saying to the prisoner in the presence of an inspector of police: "The inspector tells me you are making housebreaking implements. If this is so, you had better tell the truth; it may be better for you."

The latest decision in England on the subject of inducement, made by the court for crown cases reserved, is *Reg. v. Thompson* (1893) 2 Q. B. 12. At the trial a confession was offered in evidence, which had been made by the defendant before his arrest upon the charge of having embezzled funds of a certain corporation. Objection was interposed to its reception in evidence, on the ground that it had been made under the operation of an inducement held out by the chairman of the company in a statement to a relative of the accused, intended to be and actually communicated to the latter, that "it will be the right thing for Marcellus (the accused) to make a clean breast of it." The evidence having been admitted, and the prisoner convicted, the question was submitted to the upper court whether the evidence of the confession was properly admitted. The opinion of the appellate court was delivered by Cave, J., and concurred in by Lord Coleridge, C. J., Hawkins, Day, and Wills, JJ. After stating and adopting the ruling of Baron Parke in *Reg. v. Warringham*, 2 Denison Cr. Cas. 447, note, to the effect that it was the duty of the prosecutor to satisfy the trial judge that the confession had not been obtained by improper means, and that, where it was impossible to collect from the proof whether such was the case or not, the confession ought not to be received, the opinion referred approvingly to the declaration of Pollock, C. B., in *Reg. v. Baldry*, that the true ground of the exclusion of statements not voluntary was that "it would not be safe to receive a statement made under any influence of fear." The court then quoted the rule laid down in Russell on Crimes as being a statement of the principles which had been restated and affirmed by the Lord Chief Justice in the Fennell case, and added:

"If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magis-

trates a simple test by which the admissibility of a confession may be decided. They have to ask, is it proved affirmatively that the confession was free and voluntary? That is, was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible."

After reviewing the evidence, and holding that, under the ruling of Pollock, C. B., in the Baldry case, it was immaterial whether the statements made by the chairman were calculated to elicit the truth, and intimating that they tended to lead the prisoner to believe that it would be better for him to say something, the opinion concluded with deciding that, "on the broad, plain ground that it was not proved satisfactorily that the confession was free and voluntary," the confession ought not to have been received.

While, as we have said, there is no question that a police officer having a prisoner in custody is a person in authority, within the rule in England, and therefore that any inducement by him offered, calculated to operate upon the mind of the prisoner, would render a confession as a consequence thereof inadmissible, there seems to be doubt in England whether the doctrine does not extend further, and hold that the mere fact of the interrogation of a prisoner by a police officer would *per se* render the confession inadmissible, because of the inducement resulting from the very nature of the authority exercised by the police officer, assimilating him in this regard to a committing or examining magistrate. 3 Russ. Crimes, p. 510, note t. In *Reg. v. Johnson* (1864), 15 Ir. C. L. 60, this subject was elaborately considered by the Irish court of criminal appeal, seven of the judges writing opinions, and the majority concluding, on a full consideration of the English and Irish authorities, that a policeman was not such an official as would render *per se* any confession elicited by his questioning the prisoner inadmissible, although the fact of his questioning became an important element in determining whether inducement resulted from the language by him used. The English authorities, however, referred to in the above note to Russell on Crimes, are later in date than *Reg. v. Johnson*, although they emanate from *nisi prius* courts, and not from appellate tribunals. Whatever be the rule in this regard

in England, however, it is certain that, where a confession is elicited by the questions of a policeman, the fact of its having been so obtained, it is conceded, may be an important element in determining whether the answers of the prisoner were voluntary. The attempt on the part of a police officer to obtain a confession by interrogating has been often reproved by the English courts as unfair to the prisoner, and as approaching dangerously near to a violation of the rule protecting an accused from being compelled to testify against himself. *Berryman's Case* (1854), 6 Cox Cr. Cas. 388; *Cheverton's Case* (1862), 2 Falc. & F. 833; *Mick's Case* (1863), 3 Falc. & F. 822; *Reagan's Case* (1867), 87 Law T. (N. S.) 325; and *Reason's Case* (1872), 12 Cox Cr. Cas. 228.

From this review it clearly appears that the rule as to confessions by an accused (leaving out of consideration the rule now followed in England restricting the effect of inducements, according as such inducements were or were not held out by persons in authority) is in England to-day what it was prior to and at the adoption of the fifth amendment, and that, while all the decided cases necessarily rest upon the state of facts which the cases considered, nevertheless the decisions as a whole afford a safe guide by which to ascertain whether in this case the confession was voluntary, since the facts here presented are strikingly like those considered in many of the English cases.

We come, then, to the American authorities. In this court the general rule that the confession must be free and voluntary—that is, not produced by inducements engendering either hope or fear—is settled by the authorities referred to at the outset. The facts in the particular cases decided in this court, and which have been referred to, manifested so clearly that the confessions were voluntary that no useful purpose can be subserved by analyzing them. In this court also it has been settled that the mere fact that the confession is made to a police officer, while the accused was under arrest in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary; but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not the statements of the prisoner were voluntary. *Hopt v. Utah*, 110 U. S. 574, 4 Am. Cr. R. 457; *Sparf v. U. S.*, 156 U. S. 51, 55,

ante, 168. And this last rule thus by this court established is also the doctrine upheld by the state decisions.

In the various state courts of last resort the general rule we have just referred to, that a confession must be voluntary, is generally recognized, although in Indiana there is a statute authorizing confessions obtained by inducements to be given in evidence to the jury, with all the attending circumstances, except when made under the influence of fear produced by threats, while it is also provided that a conviction can not be had by proof of a confession made under inducement, "without corroborating testimony." Rev. Stat. Ind. 1881, § 1802 (Rev. St. 1894, § 1871). And, in the Texas Code of Procedure (article 750) it is provided that confessions shall not be used against a prisoner at his trial "if, at the time it was made, the defendant was in jail or other place of confinement, nor where he was in custody of an officer, unless such confession be made in the voluntary statement of the accused, taken before an examining court in accordance with law; or be made voluntarily, after having been first cautioned that it may be used against him; or unless, in connection with such confession, he makes statement of facts or of circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or instrument with which he states the offense was committed."

The English doctrine which restricts the operation of inducements solely to those made by one in authority has been adopted by some state courts, but disapproved of in others, as in Ohio. *Spears v. State*, 2 Ohio St. 583. Whether it is one which should be followed by this court in view of the express terms of the constitution need not be now considered, as it does not arise under the state of facts here presented. In some it is also held that the fact that the accused is examined on oath by a magistrate or coroner, or by a grand jury, with or without an oath, will *per se* exclude confessions, because of the influence presumed to arise from the authority of the examining officer or body. *People v. McMahon*, (1857) 15 N. Y. 384, followed in *People v. Mondon*, (1886) 103 N. Y. 211, 218; *State v. Matthews*, (1872) 66 N. C. 106; *Jackson v. State*, (1879) 56 Miss. 311, 312; *State v. Clifford*, (1892) 86 Iowa, 550. This doctrine as to examining magistrates is in some states enforced by statutes somewhat similar in character to the English statutes. 2 Tayl. Ev., § 888, note 2.

In some of the states it has been held that where questions are propounded to a prisoner by one having a right to ask them, and he remains silent, where from the nature of the inquiries, if innocent, reply would naturally be made, the fact of such silence may be weighed by the jury. See authorities collected in Chamberlayne's note (4) to 2 Tayl. Ev. p. 588, *et seq.*

Having stated the general lines upon which the American cases proceed, we will not attempt to review in detail the numerous decisions in the various courts of last resort in the several states treating of confessions in the divergent aspects in which that doctrine may have presented itself, but will content ourselves with a brief reference to a few leading and well-considered cases treating of the subject of inducements, and which are therefore apposite to the issue now considered.

In the following cases the language in each mentioned was held to be an inducement sufficient to exclude a confession or statement made in consequence thereof: In *Kelly v. State* (1882), 72 Ala. 244, saying to the prisoner: "You have got your foot in it, and somebody else was with you. Now, if you did break open the door the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and nothing but the truth." In *People v. Barrie*, 49 Cal. 342, saying to the accused: "It will be better for you to make a full disclosure." In *People v. Thompson* (1890), 84 Cal. 598, 605, saying to the accused: "I don't think the truth will hurt anybody. It will be better for you to come out and tell all you know about it, if you feel that way." In *Berry v. U. S.* (1893), 2 Colo. 186, 188, 203, advising the prisoner to make full restitution, and saying: "If you do so, it will go easy with you. It will be better for you to confess. The door of mercy is open, and that of justice closed;" and threatening to arrest the accused and expose his family if he did not confess. In *State v. Bostick* (1845), 4 Har. (Del.) 563, saying to one suspected of crime: "The suspicion is general against you, and you had as well tell all about it. The prosecution will be no greater. I don't expect to do anything with you. I am going to send you home to your mother." In *Green v. State* (1891), 88 Ga. 516, saying to the accused: "Edmund, if you know anything, it may be best for you to tell it;" or, "Edmund, if you know anything, go and tell it, and it may be best for you." In *Rector v. Com.* (1882), 80 Ky. 468, saying to the prisoner in a

case of larceny: "It will go better with you to tell where the money is. All I want is my money, and if you will tell me where it is, I will not prosecute you hard." In *Biscoe v. State* (1887), 67 Md. 6, saying to the accused: "It will be better for you to tell the truth, and have no more trouble about it." In *Com. v. Nott* (1883), 135 Mass. 269, saying to the accused: "You had better own up. I was in the place when you took it. We have got you down fine. This is not the first you have taken. We have got other things against you nearly as good as this." In *Com. v. Myers* (1894), 160 Mass. 530, saying to the accused: "You had better tell the truth." In *People v. Wolcott* (1883), 51 Mich. 612, saying to the accused: "It will be better for you to confess." In *Territory v. Underwood* (1888), 8 Mont. 131, saying to the prisoner that it would be better to tell the prosecuting witness all about it, and that the officer thought the prosecuting witness would withdraw the prosecution, or make it as light as possible. In *State v. York* (1858), 37 N. H. 175, saying to one under arrest immediately before a confession, "If you are guilty, you had better own it." In *People v. Phillips* (1870), 42 N. Y. 200, saying to the prisoner: "The best you can do is to own up. It will be better for you." In *State v. Whitfield* (1874), 70 N. C. 356, saying to the accused: "I believe you are guilty. If you are, you had better say so. If you are not, you had better say that." In *State v. Drake* (1893), 113 N. C. 624, saying to the prisoner: "If you are guilty, I would advise you to make an honest confession. It might be easier for you. It is plain against you." In *Vaughan v. Com.* (1867), 17 Grat. 576, saying to the accused: "You had as well tell all about it."

We come, then, to a consideration of the circumstances surrounding, and the facts established to exist, in reference to the confession, in order to determine whether it was shown to have been voluntarily made. Before analyzing the statement of the police detective as to what took place between himself and the accused, it is necessary to recall the exact situation. The crime had been committed on the high seas. Brown, immediately after the homicide, had been arrested by the crew in consequence of suspicion aroused against him, and had been by them placed in irons. As the vessel came in sight of land, and was approaching Halifax, the suspicions of the crew having been also directed to Bram, he was arrested by them, and placed in

irons. On reaching port, these two suspected persons were delivered to the custody of the police authorities of Halifax, and were there held in confinement, awaiting the action of the United States consul, which was to determine whether the suspicions which had caused the arrest justified the sending of one or both of the prisoners into the United States for formal charge and trial. Before this examination had taken place, the police detective caused Bram to be brought from jail to his private office; and, when there alone with the detective, he was stripped of his clothing, and either while the detective was in the act of so stripping him, or after he was denuded, the conversation offered as a confession took place. The detective repeats what he said to the prisoner, whom he had thus stripped, as follows:

"When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me. Where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.'"

The fact, then, is that the language of the accused, which was offered in evidence as a confession, was made use of by him as a reply to the statement of the detective that Bram's co-suspect had charged him with the crime; and although the answer was in the form of a denial, it was doubtless offered as a confession, because of an implication of guilt which it was conceived the words of the denial might be considered to mean. But the situation of the accused, and the nature of the communication made to him by the detective, necessarily overthrow any possible implication that his reply to the detective could have been the result of a purely voluntary mental action; that is to say, when all the surrounding circumstances are considered in their true relations, not only is the claim that the statement was voluntary overthrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind.

It can not be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that if he remained

silent it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person; and it can not be conceived that the converse impression would not also have naturally arisen that, by denying, there was hope of removing the suspicion from himself; if this must have been the state of mind of one situated as was the prisoner when the confession was made, how, in reason, can it be said that the answer which he gave, and which was required by the situation, was wholly voluntary, and in no manner influenced by the force of hope or fear? To so conclude would be to deny the necessary relation of cause and effect. Indeed, the implication of guilt resulting from silence has been considered by some state courts of last resort, in decided cases, to which we have already made reference, as so cogent that they have held that where a person is accused of guilt, under circumstances which call upon him to make denial, the fact of his silence is competent evidence as tending to establish guilt. While it must not be considered that, by referring to these authorities, we approve them, it is yet manifest that, if learned judges have deduced the conclusion that silence is so weighty as to create an inference of guilt, it can not, with justice, be said that the mind of one who is held in custody under suspicion of having committed a crime would not be impelled to say something when informed by one in authority that a co-suspect had declared that he had seen the person to whom the officer was addressing himself commit the offense, when otherwise he might have remained silent but for fear of the consequences which might ensue; that is to say, he would be impelled to speak either for fear that his failure to make answer would be considered against him, or in hope that, if he did reply, he would be benefited thereby. And these self-evident deductions are greatly strengthened by considering the place where the statements were made, and the conduct of the detective toward the accused. Bram had been brought from confinement to the office of the detective, and there, when alone with him, in a foreign land, while he was in the act of being stripped or had been stripped of his clothing, was interrogated by the officer, who was thus, while putting the questions and receiving answers thereto, exercising complete authority and control over the person he was interrogating. Although these facts may not, when isolated each from the other, be sufficient to warrant

the inference that an influence compelling a statement had been exerted; yet, when taken as a whole, in conjunction with the nature of the communication made, they give room to the strongest inference that the statements of Bram were not made by one who, in law, could be considered a free agent. To communicate to a person suspected of the commission of crime the fact that his co-suspect has stated that he has seen him commit the offense, to make this statement to him under circumstances which call imperatively for an admission or denial, and to accompany the communication with conduct which necessarily perturbs the mind and engenders confusion of thought, and then to use the denial made by the person so situated as a confession, because of the form in which the denial is made, is not only to compel the reply, but to produce the confusion of words supposed to be found in it, and then use statements thus brought into being for the conviction of the accused. A plainer violation as well of the letter as of the spirit and purpose of the constitutional immunity could scarcely be conceived of.

Moreover, aside from the natural result arising from the situation of the accused and the communication made to him by the detective, the conversation conveyed an express intimation rendering the confession involuntary, within the rule laid down by the authorities. What further was said by the detective? "Now, look here Bram, I am satisfied that you killed the captain, from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime upon your own shoulders.'" But how could the weight of the whole crime be removed from the shoulders of the prisoner as a consequence of his speaking, unless benefit as to the crime and its punishment was to arise from his speaking? Conceding that, closely analyzed, the hope of benefit which the conversation suggested was that of the removal from the conscience of the prisoner of the merely moral weight resulting from concealment, and therefore would not be an inducement, we are to consider the import of the conversation, not from a mere abstract point of view, but by the light of the impression that it was calculated to produce on the mind of the accused, situated as he was at the time the conversation took place. Thus viewed, the

weight to be removed by speaking naturally imported a suggestion of some benefit as to the crime and its punishment as arising from making a statement.

This is greatly fortified by a consideration of the words which preceded this language; that is, that Brown had declared he had witnessed the homicide, and that the detective had said he believed the prisoner was guilty, and had an accomplice. It, in substance, therefore, called upon the prisoner to disclose his accomplice, and might well have been understood as holding out an encouragement that, by so doing, he might at least obtain a mitigation of the punishment for the crime which otherwise would assuredly follow. As said in the passage from Russell on Crimes already quoted: "The law can not measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted." In the case before us we find that an influence was exerted, and, as any doubt as to whether the confession was voluntary must be determined in favor of the accused, we can not escape the conclusion that error was committed by the trial court in admitting the confession under the circumstances disclosed by the record.

Our conclusion that the confession was wrongfully admitted renders it unnecessary to pass on the serious question arising from the ruling of the trial court by which, in cross-examination, the accused was denied the right to ask the detective as to an article of personal property taken from the prisoner at the time the alleged confession was had. In other words, that the accused could not bring out, by way of cross-examination, everything which took place at the time of the alleged confession, but was compelled, in order to do so, to make the detective his own witness, and therefore be placed in the position where he could not impeach him. We are also, as the result of our conclusion on the subject of the confession, relieved from examining the many other assignments of error, except in so far as they present questions which are likely to arise on the new trial.

We will now briefly consider the alleged errors of this character.

By plea and supplemental plea in abatement, and by motion to quash, defendant, preliminary to the trial; attacked the

sufficiency of the indictment, because one of the grand jurors was permitted to affirm, and the indictment failed to state that such juror was "conscientiously scrupulous" of being sworn, and because the indictment recited that it was presented upon the "oath" of the jurors, when in fact it was presented upon the oath and affirmation of the jurors. At the hearing of the pleas in abatement, it appeared that, when the grand jurors were impaneled, one of them, upon being called to be sworn, stated that he affirmed, and declined to take an oath, and, after his fellows had been regularly sworn, he was formally affirmed to the same duties specified in the oath administered to the others. It is also stated in the record, following the recital of the issuance of venires for grand and petit jurors, that:

"In obedience to the said order of court, and to the venires issued thereunder, the following named grand jurors attended on the 15th day of October, A. D. 1896. On that day the said grand jurors were duly impaneled as the grand jury for the October term of this court, A. D. 1896. All of said grand jurors, being inpaneled aforesaid, were duly sworn, except grand juror William Merrill, Junior, of West Newbury, who duly affirmed, twenty-one grand jurors being in attendance."

In section 1 of the Revised Statutes of the United States it is provided, among other things, that in determining the meaning of the Revised Statutes, "a requirement of an 'oath' shall be deemed complied with by making affirmation in judicial form." Section 800 also provides that:

"Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned; and they shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practiced in such State courts, so far as such may be practicable by the courts of the United States or the officers thereof. And for this purpose the said courts may, by rule or order, conform the designation and impaneling of juries in substance to the laws and usages relating to jurors in the State courts, from time to time in force in such State. This section shall not apply to juries to serve in the courts of the United States in Pennsylvania."

Pub. St. Mass., 1882, c. 213, § 6, provides as follows:

"Sec. 6. When a person returned as grand juror is conscientiously scrupulous of taking the oath before prescribed, he shall be allowed to make affirmation, substituting the word 'affirm' instead of the word 'swear,' and also the words 'this you do under the pains and penalties of perjury,' instead of the words 'so help you God.'"

And section 8 of chapter 30 of the same statutes provides as follows, (page 58):

"In the construction of statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general court or repugnant to the context of the same statute, that is to say: * * * Fourteenth. The word 'oath' shall include 'affirmation' in cases where, by law, an affirmation may be substituted for an oath."

The objection that the indictment recited that it was presented "upon the oath" of the jurors, when the fact was that it was presented "upon the oath and affirmation" of the jurors, is without merit. Waiving a consideration of the question whether, under the provisions of the statutes to which reference has been made, the word "oath" might not properly be construed as meaning either "oath" or "affirmation," the recital alluded to was purely formal, and, if defective, was open to amendment. The record disclosing the fact that all of the grand jurors were duly sworn except grand juror William Merrill, Jr., who was "duly affirmed," the defendant could not have been prejudiced by the form of the statement made in the indictment, and the defect, if any, was rendered harmless by the curative provisions of section 1025, Rev. St.

The further objection that neither in the indictment nor in the proof at the hearing of the pleas in abatement was it affirmatively stated or shown that grand juror Merrill, before being permitted to affirm, was proven to have possessed conscientious scruples against taking an oath, is practically concluded by the disposition made of the objection just passed upon, and is rendered nugatory by the terms of section 1025, Rev. St. Further, the mode of ascertaining the existence or non-existence of such conscientious scruples was committed to the discretion of the officer who affirmed the juror, and such affirmation conclusively established that the officer had properly exercised his discretion. *Com. v. Fisher*, 7 Gray, 492; *State v. Adams*, 78 Me. 486.

The remaining assignments which we deem it proper, to notice relate to the overruling of objections interposed to questions propounded to certain witnesses in the character of experts. Some of these objections were made to hypothetical questions asked a number of sailors, reciting the condition of things assumed to have been established by the evidence as existing about the time of the killing, viz., the speed of the Herbert Fuller, the condition of her sails, direction of wind, etc., and inquiry as to the effect it would have on the vessel if the wheelman had taken his hands off the wheel, and what effect would be produced by lashing the wheel under similar conditions. These questions were evidently intended to supplement the testimony of Brown, who swore that he stood with both hands on the wheel during the time between 12 and 2 o'clock and, consequently, when the murders were committed. The questions were competent, as the testimony sought to be elicited was relevant to the issue. Aside from the testimony of Brown, the evidence against Bram was purely circumstantial, and it was clearly proper for the government to endeavor to establish, as a circumstance in the case, the fact that another person who was present in the vicinity at the time of the killing could not have committed the crime. The testimony sought to be adduced had this tendency, and the fact that it might operate indirectly to fortify the credit of such person as the witness in the cause could not affect its admissibility.

An objection to a question asked of a medical witness, whether, in his opinion, a man standing at the hip of a recumbent person, and striking blows on that person's head and forehead with an ax, would necessarily be spattered with or covered with some of the blood, was also properly overruled. We think the assumed facts recited in the question were warranted by the proof in the case, and that the evidence sought to be elicited from the witness was of a character justifying an expression of opinion by the witness, the jury, after all, being at liberty to give to the evidence such weight as in their judgment it was entitled to. *Hopt v. Utah*, 120 U. S. 430.

The judgment is reversed and the cause remanded, with directions to set aside the verdict and to order a new trial.

Mr. Justice BREWER, dissenting.

I dissent from the opinion and judgment in this case—

First, because I think the testimony was not open to objec-

t. n. "A confession, if freely and voluntarily made, is evidence of the most satisfactory character." *Hopt v. People*, 110 U. S. 574, 584, reaffirmed in *Sparf v. U. S.*, 156 U. S., 51, 55. The fact that the defendant was in custody and in irons does not destroy the competency of a confession. "Confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises." *Sparf v. U. S.*, *supra*, 168. See also *Wilson v. U. S.*, 162 U. S. 613-623.

The witness Power, when called, testified positively that no threats were made nor any inducements held out to Bram; and this general declaration he affirmed and reaffirmed in response to inquiries made by the court and the defendant's counsel. The court therefore properly overruled the objection at that time made to his testifying to the statements of defendant. It is not suggested that there was error in this ruling, and the fact that inducements were held out is deduced only from the testimony subsequently given by Power of the conversation between him and Bram. The first part of that conversation is as follows: "When Mr. Bram came into my office I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me. Where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.'" In this there is nothing which by any possibility can be tortured into a suggestion of threat or a temptation of hope. Power simply stated the obvious fact that they were trying to unravel a horrible mystery, and the further fact that Brown had charged the defendant with the crime, and the replies of Bram were given as freely and voluntarily as it is possible to conceive.

It is strange to hear it even intimated that Bram, up to this time, was impelled by fear or allured by hope caused in the slightest degree by these statements of Power.

The balance of the conversation is as follows: "I said: 'Now, look here, Bram, I am satisfied that you killed the captain, from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime

alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies." And here, it is argued, was a suggestion of a benefit—the holding out of a hope that a full disclosure might somehow inure to his advantage. To support this contention involves a refinement of analysis which, while it may show marvelous metaphysical ability, is of little weight in practical affairs. But, even if it did carry any such improper suggestion, it was made at nearly the close of the conversation; and that this suggestion then made had a retroactive effect, and transformed the previous voluntary statements of Bram into statements made under the influence of fear or hope, is a psychological process which I am unable to comprehend. The only reply which Bram made to the question containing this supposed improper suggestion was this: "Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it." Can it for a moment be thought that such a reply was so significant that permitting it to go to the jury compels the putting at naught this protracted trial, and overthrowing the deliberate verdict of the twelve men who heard the evidence and condemned defendant? With all respect to my brethren who are of a different opinion, I can but think that such a contention is wholly unsound, and that in all this conversation with Bram there was nothing of sufficient importance to justify the reversal of the judgment.

Again, there is a lack of any proper objection or exception; and, if there is any one thing which may be considered as settled in all appellate courts, it is that an error in the admission of testimony will not be considered unless there was a specific objection and exception at the trial. "To authorize any objection to the admission or exclusion of evidence, or to the giving or refusal of any instructions to the jury, to be heard in this court, the record must disclose not merely the fact that the objection was taken in the court below, but that the parties excepted at the time to the action of the court thereon." *Hutchins v. King*, 1 Wall. 53, 60; *U. S. v. McMasters*, 4 Wall. 680, 682. "Our power is confined to exceptions actually taken at the trial." *Railway Co. v. Heck*, 102 U. S. 120. See, also,

Moore v. Bank, 13 Pet. 302; *Camden v. Doremus*, 3 How. 515; *Zeller's Lessee v. Eckert*, 4 How. 289, 297; *Phelps v. Mayer*, 15 How. 160; *Dredge v. Forsyth*, 2 Black, 563; *Young v. Martin*, 8 Wall. 354; *Bell v. Meagher*, 104 U. S. 279; *Hanna v. Maas*, 122 U. S. 24; *White v. Barber*, 123 U. S. 392, 419; *Stewart v. Runche Co.*, 128 U. S. 383; *Anthony v. Railroad Co.*, 132 U. S. 172; *Block v. Darling*, 140 U. S. 234; *Bogk v. Gassert*, 149 U. S. 17.

It is true these were civil cases, for it is only in the later history of this court that we have had jurisdiction of writs of error in criminal cases; but the law is equally applicable to the latter. "It is the duty of counsel seasonably to call the attention of the court to any error in impaneling the jury, in admitting testimony, or in any other proceeding during the trial, by which his rights are prejudiced, and, in case of an adverse ruling, to note an exception." *Alexander v. U. S.*, 138 U. S. 353, 355. "The general rule undoubtedly is that an objection should be so framed as to indicate the precise point upon which the court is asked to rule." *Sparf v. U. S.*, 156 U. S. 51; *Holder v. U. S.*, 150 U. S. 91; *Tucker v. U. S.*, 151 U. S. 164.

It is true the defendant objected to the admission of the conversation before it was given; but, upon the state of facts as then presented, unquestionably the trial court ruled properly in permitting the witness to testify, for he positively declared that there was neither threat nor promise, intimidation or inducement. If it be true, as the court now holds, that in the progress of his testimony it was developed that he did make a statement which carried an inducement—a suggestion of hope—it was then the duty of the defendant to call the attention of the court to the matter, either by objecting to any further disclosures of the conversation, or else by a motion to strike out. Nothing of the kind took place. Defendant was apparently content to let all of the subsequent conversation come in. Can it be held that the court erred in not of its own motion stopping the witness, or striking out the testimony, or instructing the jury to disregard it, when defendant asked nothing of the kind? Surely, by this decision we practically overrule the long line of authorities heretofore cited affirming the necessity of calling the attention of the trial court to the specific matter, obtaining its ruling thereon,

and saving an exception thereto before there is any jurisdiction in this court to review. Nor is this a mere technical and arbitrary rule which may be dispensed with whenever the exigencies of any case seem to demand, and in no other way a ground for reversal can be discovered. It may be, and undoubtedly often is the case, that, though incompetent testimony be given, the defendant prefers that it shall remain, in order, for certain purposes, to take advantage of it in the argument before the jury. Can it be possible that he may obtain this advantage, and, having obtained and used it, insist that because of such incompetent testimony, he is entitled to a reversal of the judgment against him? *Wilson v. U. S.*, 162 U. S. 613-624. Who shall say that this defendant, though at first objecting to any testimony respecting his statements, yet, after hearing what the witness said, did not prefer that such testimony remain, as it disclosed that at the very first moment he was informed that Brown charged him with the crime, he protested that Brown was not in a position where he could see who did the killing? Indeed, for anything in this record to the contrary, he, when a witness in his own behalf, may have given the same version of the conversation, and admitted that his statements were voluntarily made. Who shall say that he did not wish to argue before the jury that the claim made of Brown's inability to see what took place was not an excuse suggested only by the exigencies of the trial, but was presented at the very first moment of the charge; and if he was willing to let the testimony remain, and have all the advantage which he could take of it in an argument before the jury, can it be that he can now come to this court and say, "True, I did not object to this specific testimony, nor ask to have it stricken out, but it was incompetent," and obtain a reversal on the ground of its admission?

I dissent, therefore: First, because I think the testimony was properly received; and, secondly, because no motion was made to strike it out, and no exception taken to its admission.

The Chief Justice and Mr. Justice Brown concur in this dissent.

STATE v. SCOTT.

(49 La. Ann. 253.)

MURDER: *Insanity—Burden of proof.*

1. The law presuming sanity, the burden is on the accused urging his insanity as a defense to prove it.
2. That proof must satisfy the jury the accused was not of sane mind at the time of the act charged. They should consider all the testimony before them, whether produced by the accused or the State, and give due weight to the presumption of sanity. If, on the whole testimony, and giving to the presumption of sanity its full operation, they are satisfied the accused was insane when the act was committed, they should acquit; but, if not thus satisfied, they should deem the accused sane, and responsible.

Appeal from Criminal District Court, Parish of Orleans;
James C. Moïse, Judge.

John Scott was convicted of manslaughter and appeals.
Reversed.

Charles C. Luzenberg and Bernard Titcher, for appellant.

Milton J. Cunningham, Attorney-General; *Robert H. Marr*, District Attorney, and *John J. Finney*, Assistant District Attorney, for the State.

MILLER, J. The accused, indicted for murder, convicted, and sentenced for manslaughter, takes this appeal. The accused relies on a number of exceptions to the charge of the judge. But the question sought to be raised in nearly all is as to the correctness of the charge in respect to the defense of insanity, and the refusal of the instruction on that subject requested on behalf of the accused. On this defense of insanity the instruction in part was: "Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crime, until the contrary be satisfactorily proved. When insanity is set up as a defense for crime, it must be proved as a substantive fact by the party alleging it, on whom lies the burden of proof. The degree of proof must be by a preponderance of evidence. This does not mean a preponderance of witnesses, but it means that, taking all of the evidence into consideration, the weight and effect of it is to satisfy your

minds that at the time of the commission of the act the prisoner was insane. The presumption of sanity must be overthrown, and this presumption exists with as much force as the presumption of innocence. As the law presumes a man to be innocent until he is proven guilty, if there is a reasonable doubt as to his guilt, this degree of proof as to guilt does not overcome the presumption of innocence, and he should be acquitted. The presumption of sanity is a logical parallel to the above rule. Men are presumed to be sane until they are proven insane. If there is a reasonable doubt as to their sanity, this degree of proof as to insanity does not overthrow the presumption of sanity, and the jury should find him sane. These two presumptions of law as to 'innocence' and 'sanity' stand upon the same footing. The burden is upon the State to overcome the presumption of innocence, while the burden is upon the defendant to overcome the presumption of sanity when insanity is set up as a defense, and both presumptions should be overcome beyond reasonable doubt." To this part of the charge the defendant excepted as ambiguous, contradictory and not a correct exposition of law. It is urged on us that this portion of the charge placed before the jury for their guidance two different rules of proof—one that the preponderance of testimony sufficed, and the other that proof beyond a reasonable doubt was required to establish insanity as a defense. Our decision is controlled by a more important factor. The objection in varied forms presented by the other bills is, in effect, that the charge is erroneous in its requirement of the degree of proof requisite to support the defense of insanity. The charge recognizes the distinction between the preponderance of proof and that which excludes all reasonable doubt, and instructs that the burden is on the accused to prove beyond all reasonable doubt he was not sane at the time of the commission of the act charged. The charge follows that sustained by our predecessors in *State v. De Rance*, 34 La. Ann. 186, and in *State v. Burns*, 25 La. Ann. 302, and *State v. Coleman*, 27 La. Ann. 691. Without the sanity of the accused, there can be no guilt. Humanity and the law alike concur in this, and utterly exclude punishment for crime when there is no moral responsibility of the accused. It is familiar that guilt must be proved beyond a reasonable doubt before punishment can be inflicted. Yet the charge in this case places on the accused the burden

of disproving one of the constituents of guilt, and exacts of him the highest order of proof known to the law. In both aspects the proposition has been controverted by text writers and decisions. The preponderance of proof is recognized as that of a character to satisfy the mind, though it be not free from reasonable doubt. This preponderating proof is enough in civil cases to authorize a finding in favor of the party. The terms are of constant use in the administration of the criminal law. The charge in this case implies, if it does not express, that though there may be a preponderance of testimony before the jury to show that the accused was insane at the time of the act, yet they may convict. It is not easy to conceive that with this preponderating proof they can deem guilt established beyond a reasonable doubt—the prerequisite of any conviction. Can, then, this charge be sustained, which exacts punishment upon preponderating proof producing not only a reasonable doubt of guilt, but preponderating to carry the conclusion that no guilt can exist because of the absence of that moral accountability, the basis of all punishment for crime. Between hanging the maniac or bringing to the scaffold one whose insanity is established by a preponderance of testimony before the jury that pronounces him guilty, is a difference in degree, not of principle. A conviction, when insanity is thus proved, this charge sanctions. If we turn to the authority of text books and decisions, it must seem difficult to maintain the charge conceding all due weight to the decisions of our predecessors and types of that class in some of the decisions of the courts of other states. In *State v. Spencer*, 21 N. J. Law, 196, the court instructed, if in weighing testimony of insanity against that of sanity the scales are balanced, or so nearly poised as to leave a reasonable doubt of insanity, the accused was to be deemed sane. This decision, that sustains punishment when guilt is ascertained by the balanced or nearly poised scale, is in marked contrast with the rule that exacts proof of guilt beyond all reasonable doubt. In one of the text-books there is the comment that the decision has been departed from in the New Jersey courts. 2 Bish. Cr. Proc., Sec. 671. The case of *Reg. v. Layton*, 4 Cox Cr. Cas. 149, is cited by the state as supporting the charge under consideration. But, as we gather that decision from the report, the instruction was that sanity was to be presumed till the contrary was

proved, and the question for the jury was whether the accused had proved to their satisfaction he was not of sound mind. There was no requirement of proof beyond that point; *i. e.*, the satisfaction of the jury. All the decisions tending to exact from the accused a higher degree of proof have had our attention. On the other hand, the text-books and the weight of the decisions, while affirming that the burden of proof of insanity is on the accused, maintain that the proof suffices that establishes insanity to the satisfaction of the jury. In 1 Waterman's Archbold, there is an array of authority; with others, the case of *M'Naghten*, 10 Clark & F. 200, is cited, much discussed in the house of lords, and led to questions propounded to the judges as to the terms in which the question of insanity should be submitted to the jury. The answer was that the accused was to be presumed sane until the contrary was proved to the satisfaction of the jury. That charge is brief, plain, and easily understood. It is commended in all the text-books. It exacts no greater degree of proof than that required to satisfy the mind, and precludes any acquittal for insanity when the proof does not convince the jury on the point of inquiry. Other authority arrayed by Mr. Archbold is to the effect that the testimony of insanity must be sufficient to overrule the presumption of sanity, and satisfy the jury the accused was not sane; or, as put in another form, to sustain the defense the evidence must convince the jury that when the act was done the prisoner was not conscious he was committing crime. 1 Archb. Cr. Prac. & Pl. pp. 37, 38, *et seq.* Other decisions have qualified the proof to be administered by the prisoner as a preponderance of the whole evidence that he was insane when he committed the act. *Com. v. Eddy*, 7 Gray, 583; *Com. v. Rogers*, 7 Metc. (Mass.) 500, 506. The charge sanctioned in *U. S. v. McGlue*, 1 Curt. 1, was that, the burden resting on the accused to prove insanity, the whole evidence must satisfy the jury the prisoner was insane, otherwise he should not be acquitted. In Whart. Cr. Law, the text is, the defense of insanity must be proved by the accused as an independent fact, and he alludes to the Spencer case, and to decisions on the other hand maintaining the sufficiency of preponderating proof of insanity. In the late edition of Wharton this preponderating proof is stated to be all that is required. Whart. Cr. Law, Sec. 711, and notes; Id. (10th Ed.)

Sec. 62, and notes. It is Mr. Bishop's view, reviewing all the authorities, that it is never incumbent on the state to give affirmative evidence of the sanity of the accused, but if denied by proof administered by him the jury alone, with the presumption of sanity, must consider all the evidence; and if then they entertain a reasonable doubt of whether the accused did the act in a sane state of mind, they are to acquit, otherwise they are to convict. 1 Bish. Cr. Proc., Sec. 534. The same view substantially has been announced quite recently by the Supreme Court of the United States, and is thus expressed in the headnote: "No man is to be deprived of his life under the forms of law unless the jurors who are to try him are able on their consciences to say that the evidence before them, whether adduced on his behalf or by the state, is sufficient to show beyond a reasonable doubt every essential of the crime;" and mental competency to distinguish between right and wrong was, of course, recognized as one of the constituents of the crime. *Davis v. U. S.*, 160 U. S. 469. In the light of principle and authority, we can not assent to the proposition affirmed by this charge that with preponderating testimony of the insanity of the accused they may convict on the theory that a higher order of proof is required. In this view the sentence must be reversed.

In view of the new trial, we deem it proper to say, with respect to other objections reserved by the accused, that the charge in a criminal case should be restricted to the questions fairly arising on the testimony. In our view, the explanation of insanity, whether it be termed temporary or epileptic in its character, was sufficient to meet the inquiry arising on the testimony, though an addition as to that form, produced by the absence of will power, would be appropriate. Whart. & S. Med. Jur. p. 38. We think it well to add, too, that on the issue of insanity, testimony of the conduct of the accused before and after the act is proper to go to the jury under proper instructions. 2 Greenl. Ev., Sec. 371. While the misuse or abuse of this defense of insanity can not affect the legal principle on which the defense is allowed, we are deeply impressed with the importance of guarding against the failure of justice arising from the frequent interposition without foundation of this defense of insanity, characterized in one of the decisions as the last resort of desperate criminals. We have already suggested

the charge should be restricted within the scope of the questions fairly arising on the testimony, and not extend to forms, real or supposed, of mental disorder, not the subjects of inquiry under the testimony laid before the jury. The charge should be clear, and avoid unnecessary qualifications. We think Prof. Greenleaf's summary of the essentials of the instruction as to the burden and degree of proof required on the defense of insanity meets substantial requirements. 2 Greenl. Ev., Sec. 373. We think it will suffice if the jury are told, in effect, that the burden of proof is on the accused to establish, by clear and convincing proof, the insanity he urges as a defense; that the presumption of sanity is to be taken into consideration, and exercise its full influence, along with all the testimony before them, whether produced by the accused or by the state; and if, on the consideration of the whole testimony, giving due weight to the presumption of sanity, they are satisfied the accused was not of sane mind when the act charged was committed, they are to acquit, but if not thus satisfied, they are to hold the accused sane and responsible. With clear instruction as to the presumption of sanity, the burden of disproving it, and that, in order to acquit on the ground of insanity, the jury must be satisfied of that insanity by clear and convincing proof, it seems to us there should be no convictions of insane, nor misapprehensions by the jury of their duty to hold the accused sane and responsible, when not satisfied of the insanity urged in his defense. For the reasons given in this opinion, it is now ordered, adjudged and decreed that the sentence of the accused be annulled and set aside; that he be again put on trial on the indictment, and be held in custody to abide the verdict on the new trial.

WATKINS, J. (concurring). The defendant was indicted for murder, convicted of manslaughter, and sentenced to imprisonment in the penitentiary for a term of fifteen years, and from that sentence appeals. Under a plea of not guilty, the defendant sought to prove insanity as a defense; but the jury evidently regarded the proof insufficient. The principal question argued at the bar and presented in the briefs of counsel on either side is as to what was the proper instruction for the trial judge to have given to the jury with regard to the degree of proof necessary for them to acquit the defendant on the

ground of insanity. In the course of his written charge the trial judge, among other things, gave to the jury the following instructions, substantially, viz.: That the presumption of sanity "exists with as much force as the presumption of innocence;" and that the presumption of sanity can only be overcome by the same degree of proof that is necessary to overcome that of innocence. That, as the law presumes a man to be innocent until he is proven guilty, if there be a reasonable doubt as to his guilt, the degree of proof as to his guilt does not overcome the presumption of innocence, and he should be acquitted. The presumption of sanity is a logical parallel to the above rule. Every one is presumed to be sane until he is proven insane. If there is a reasonable doubt as to a man's sanity, the degree of proof as to insanity does not overthrow the presumption of sanity, and the jury should find him sane. These two presumptions of law as to innocence and sanity stand upon the same footing. The burden is upon the state to overcome the presumption of innocence; while the burden is upon the defendant to overcome the presumption of sanity, when insanity is set up as a defense. "Both presumptions should be overcome beyond a reasonable doubt." To these instructions defendant's counsel excepted on the ground that same were contradictory and conflicting, and reserved a bill of exceptions thereto. An examination of a large number of decisions of the courts of different states, as well as those of the courts of England, shows that there are three distinct and well defined theories on the subject, viz.: First, that the proof administered must satisfy the minds of the jury beyond a reasonable doubt that the defendant was insane at the time of the commission of the act; second, that the burden of proof is upon the defendant to show by a fair preponderance of evidence that he was incapable of distinguishing right from wrong, and, consequently, insane; third, that if, upon the whole of the evidence adduced, that by the prosecution as well as that by the defendant, there is left in the minds of the jury a doubt as to the sanity of the accused, it is their duty to resolve that doubt in favor of the defendant, and acquit him. We will make an examination and analysis of the authorities on each theory separately, and by that means ascertain in favor of which one they preponderate.

1. On this theory the leading American authority is *State v.*

Spencer, 21 N. J. Law, 196, and we make the following quotation therefrom, viz.: "When the evidence of the insanity on the one side and of sanity on the other leaves the scale in equal balance, or so nearly poised that the jury have a reasonable doubt of his sanity, then a man is considered sane, and responsible for what he does." Again: "Proof of insanity at the time of committing the act ought to be so clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be, in order to find the sane man guilty." Again: "If, in your opinion, it is clearly proved that the prisoner at the bar, at the time of the homicide, was unconscious that what he did was wrong, and that he ought not to do it, you must acquit him on the ground of insanity; but if, in your opinion, this is not established beyond a reasonable doubt, then you must find him guilty of the act, and proceed to investigate the nature of the homicide." This case has been quoted and followed by several of the courts of other states, particularly in the following, viz.: *State v. Thomas*, Houst. Cr. Cas. 511; *Hodge v. State*, 26 Fla. 11; *State v. Crawford*, 11 Kan. 32; *Ballard v. State*, 19 Neb. 609; *Wright v. People*, 4 Neb. 407; *Faulkner v. Territory* (N. M.), 30 Pac. 905; *State v. McIntosh*, 39 S. C. 97; *State v. Patterson*, 45 Vt. 308; *Revoir v. State*, 82 Wis. 295; *Miller v. State*, 3 Wyo. 667. It will be observed that this theory has found favor in but comparatively few of the states.

2. On the second theory, those first in importance are the decisions of the English courts, and to illustrate we have made extracts from the following cases, viz.: From *Reg. v. Stokes*, 3 Car. & K. 185, we make the following selection, viz.: "If the prisoner seeks to excuse himself upon the plea of insanity, it is for him to make it clear that he was insane at the time of committing the offense charged. The *onus* rests on him; and the jury must be satisfied that he actually was insane. If the matter is left in doubt, it will be their duty to convict him; for every man must be presumed to be responsible for his own acts until the contrary is clearly shown." So in *Reg. v. Layton*, 4 Cox Cr. Cas. 149, the court said that the question for the jury was, "not whether the person was of sound mind, but whether he had made out to their satisfaction that he was not of sound mind." *M'Naghten's Case*, 10 Clark & F. 200, wherein the defendant was discharged by a jury as

not guilty of murder "on the ground of insanity," having created considerable discussion, was brought to the attention of the house of lords, and the judges were summoned to give their opinions on the question of insane delusions giving immunity for acts punishable criminally, and Lord Chief Justice Tindall, speaking for the court, said that the jury should be instructed that "every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defense on the ground of insanity, it must be clearly proved that at the time of the committing of the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing," etc. That case has been frequently cited in the decisions, English and American, and is often quoted with favor by text writers in treating of the subject of insanity. Dr. Wharton, in his treatise on Criminal Evidence, cites the case of *State v. Spencer*, 21 N. J. Law, 196,—the leading case in favor of the first theory we have outlined,—and several leading English cases, and M'Naghten's case among the number, as the representative of the second theory; and then he supplements the statement with the observation that the theory once entertained by the English courts has been so far modified that the rule announced in M'Naghten's case, that the jury is to be governed by the preponderance of evidence, is the prevalent opinion in England. Whart. Cr. Ev., Secs. 337, 338. But the modification of the theory is very readily observed by comparing the opinion of the judges in M'Naghten's case with that of Lord Mansfield in Billingham's case, cited in Russell's treatise on Crimes, as will be shown in the subjoined extract, viz.: "In Billingham's case, who was tried for the murder of Mr. Percival, a part of the prisoner's defense was insanity; and upon this part of the case Mansfield, C. J., stated to the jury that, in order to support such a defense, it ought to be proved by the most distinct and unquestionable evidence that the prisoner was incapable of judging between right and wrong; that in fact it must be proved beyond all doubt that at the time he committed the atrocious act with which he stood charged he did not consider that murder was a crime against the laws of God and nature; and there was no other proof of

insanity which would excuse murder, or any other crime," etc. 1 Russ. Crimes (7th Ed.) 16, 17. Mr. Wharton adopts the modified theory as being more consonant with reason and justice, and says: "By the common law, every man is presumed to be sane until the contrary is proved; and the better opinion is that, when insanity is set up by the defendant, it must be proved as a substantive fact by the party alleging it, on whom lies the burden of proof." Whart. Hom. (2d Ed.) Sec. 665. Mr. Greenleaf states the rule in somewhat similar terms, thus: "In all such cases the jury are to be told that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing," etc. 2 Greenl. Ev., Sec. 373. In the recent treatise of Rice on the Law of Criminal Evidence, in discussing the plea of insanity, he says: "After careful review of the various judicial *dicta*, we are inclined to recommend the instructions contained in the case of *Baldwin v. State*, 12 Mo. 223, which decision is authority for the broad proposition that the defense of insanity is established when the evidence offered in support of it preponderates in favor of the fact, and reasonably satisfies the jury that it existed at the time the criminal act charged was committed." 3 Rice Ev., Sec. 396. That author cites the case of *Boswell v. State*, 63 Ala. 307, in which it was held that "insanity is a defense which must be established to the satisfaction of the jury by a preponderance of the evidence, and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not authorize an acquittal." *Id.*, Sec. 399. The author then observes that "the adjudged cases in this country present a vast weight of authority favorable to the doctrine of Boswell's case, or at least in repudiating the rule entitling a defendant to an acquittal upon the existence of a mere reasonable doubt of his sanity."

The expressions of some of the state courts, to whose opinions we invariably turn for information, in case of serious doubt and perplexity, may here be quoted with advantage. Following the later and modified jurisprudence of the courts of Eng-

land, the Massachusetts court, in *Com. v. Rogers*, 7 Metc. 500, said: "The ordinary presumption is that a person is of sound mind until the contrary appears; and in order to shield one from criminal responsibility the presumption must be rebutted by proof of the contrary, satisfactory to the jury, either out of the evidence offered by the prosecutor to establish the cause against the accused, or from the distinct evidence offered on his part. In either case it must be sufficient to establish the fact of insanity, otherwise the presumption must stand." In *Com. v. Eddy*, 7 Gray, 583, the same court said: "But it is a presumption of law that all men are of sane mind; and that presumption of law sustains the burden of proof, unless it is rebutted and overcome by satisfactory evidence to the contrary. In order to overcome the presumption of law, and shield the defendant from legal responsibility, the burden is on him to prove, to the satisfaction of the jury, by a preponderance of the whole evidence in the case, that at the time of committing the homicide he was not of sane mind." In *Ortwein v. Com.*, 76 Pa. St. 414, the court said: "Insanity must be made to appear on behalf of the defendant; and to be made to appear to the tribunal determining the fact the evidence of it must be satisfactory, and not merely doubtful, as, nothing less than satisfaction can determine a reasonable mind to believe a fact contrary to the course of nature." In *State v. Davis*, 109 N. C. 780, the court sustained this instruction of the trial judge, viz.: "The burden is on the defendant to satisfy the jury, but not beyond a reasonable doubt, that he had not sufficient mental capacity to know right from wrong," etc. The foregoing *dicta* have been followed and repeated with perfect unanimity and without a single dissent in the following cases from the states enumerated, viz.: *Parsons v. State*, 81 Ala. 577; 7 Am. Cr. 266; *Ford v. State*, 71 Ala. 385; *Gunter v. State*, 83 Ala. 96; *Coates v. State*, 50 Ark. 330; *Cusat v. State*, 40 Ark. 511; *Bolling v. State*, 54 Ark. 588; *People v. Bemmerly*, 98 Cal. 299; *State v. Trout*, 74 Iowa, 545; *State v. Jones*, 64 Iowa, 356; *Kriel v. Com.*, 5 Bush, 362; *Moore v. Com.* (Ky.) 18 S. W. 833; *Ball v. Com.*, 81 Ky. 662; *Kaelin v. Com.*, 84 Ky. 354; *Com. v. Rogers*, 7 Metc. (Mass.) 500; *State v. Lawrence*, 57 Me. 574; *State v. Hanley*, 34 Minn. 430; *State v. Schaefer* (Mo. Sup.) 22 S. W. 447; *Loeffner v. State*, 10 Ohio St. 593; *Bond v. State*, 23 Ohio St. 349; *Ortwein v. Com.*, 76 Pa.

St. 414; *Pannell v. Com.*, 86 Pa. St. 260; *Lynch v. Com.*, 77 Pa. St. 207; *State v. Vann*, 82 N. C. 631; *State v. Bundy*, 24 S. C. 439; *State v. Paulk*, 18 S. C. 515; *Webb v. State*, 9 Tex. App. 490; *Leache v. State*, 22 Tex. App. 279; *People v. Dillon*, 8 Utah, 92; *State v. Strander*, 11 W. Va. 745; *Baccigulupo v. Com.*, 33 Grat. 807. The foregoing decisions represent the settled opinions of seventeen states of the Union upon this most important and vital question, and they are in harmony with the present jurisprudence of England.

3. The leading and most important case which favors the third theory is *Davis v. U. S.*, 160 U. S. 469, 16 Sup. Ct. 353, a case in which the question of insanity of the accused was examined with great care, and all authorities on the question were reviewed, English as well as American. That case involved the correctness of the trial judge's charge to the jury, from which we make the following extract, viz.: "In other words, if the evidence is *in equilibrio* as to the accused being sane—that is, capable of comprehending the nature and effect of his oath—he is to be treated just as he would be if there were no defense of insanity, or as if there were an entire absence of proof that he was insane." But it was the contention on the part of attorney for defendant in error that the true rule is that if the evidence raises a reasonable doubt of the sanity of the defendant, the jury should have been instructed to acquit him; that is to say, if the evidence offered by the defendant raises a doubt of his sanity, the burden is placed upon the prosecution to affirmatively overcome that doubt by proof of his sanity. In support of this proposition the decisions of the following courts are cited, viz.: Connecticut, Florida, Illinois, Indiana, Kansas, Michigan, Mississippi, Nebraska, New Hampshire, New Mexico, New York, Wisconsin and Tennessee—13 in number. The purport of these decisions is that while there is a presumption of defendant's sanity, this only goes to the extent of relieving the State of the burden of proving sanity, and without any proof on the subject, the presumption is conclusive; but where proof is adduced, establishing a reasonable doubt of his sanity, it, in effect, establishes a reasonable doubt as to whether there was malice in the homicidal act, inasmuch as malice and ill will can not exist in the mind of an insane person. Accepting this theory as most conformable to the ends of justice, the Supreme Court

said: "If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged. His guilt can not be said to have been proved beyond a reasonable doubt, his will and his acts can not be held to have joined in perpetrating the murder charged, if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or (which is the same thing) whether he willfully, deliberately, and unlawfully, and of malice aforethought, took the life of the deceased." The court cited the following cases from the states above enumerated, as supporting their theory, viz.: *People v. McCann*, 16 N. Y. 580; *Brotherton v. People*, 75 N. Y. 159; *O'Connell v. People*, 87 N. Y. 377; *Walker v. People*, 88 N. Y. 81; *Hopps v. People*, 31 Ill. 385; *State v. Bartlett*, 43 N. H. 224; *People v. Garbutt*, 17 Mich. 9; *Dove v. State*, 3 Heisk. 348; *Cunningham v. State*, 56 Miss. 269; *Plake v. State*, 121 Ind. 433; *Polk v. State*, 19 Ind. 173; *Bradley v. State*, 31 Ind. 492; *McDougal v. State*, 88 Ind. 24. And, finally, they adopted the view expressed by the Supreme Court of the District of Columbia in *Guiteau's Case*, 10 Fed. 161. It is a fact that is worthy of observation that the supreme court cite no other decision of their own as a precedent therefor, and that they refer to no treatise on criminal law as supporting the theory upheld by them. On the contrary, they admit that the jurisprudence of the English courts maintains the correctness of the second proposition, *supra*; and that the courts of a great number of the states of the Union do likewise. Mr. Wharton says of the theory maintained by the supreme court in the Davis case: "This is a modern and strictly American doctrine, and it finds no countenance, so far as I can discover, amongst the best law writers or adjudged cases in England. It seems to be supported by Mr. Bishop, alone, of the American text writers, and finds support in the decisions of only some nine or ten of the highest courts in the several states." Whart. Hom., § 399. In proof of this assertion the author cites the greater portion of the decisions referred to by the court in the Davis case, and 2 Bish. Cr. Law, § 673; and he cites *contra*, many of the decisions we have referred to on the other side.

4. According to our judgment, this court has, in at least two cases, expressed its approval of the second theory; but in some opinions of recent date it has adopted the first. In so doing it has pursued an exactly opposite course from that adopted by the English courts, which have changed from the first to the second; and that of the Supreme Court, which, as a matter of first impression, has chosen the third one. For instance, in *State v. Burns*, 25 La. Ann. 302, the trial judge was requested to charge the doctrine of the Davis case, to the effect "that, if they entertained a reasonable doubt as to the sanity of the prisoner at the time of the commission of the alleged act, they were bound to acquit him;" but on the contrary, the judge charged the jury "that the law presumes the sanity of every man, and that it devolved upon the prisoner, under the plea of insanity, to satisfy the jury by a reasonable preponderance of proof that he was insane at the time of the commission of the alleged act." And this court said: "We think the judge did not err in this charge. The true rule is that the jury are to be told that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason, from disease of mind, as not to know the nature and character of the act he was doing, or, if he did know it, that he did not know that it was wrong." In *State v. Coleman*, 27 La. Ann. 691, the charge given to the jury was very nearly the same as that given in the *Burns* case, as will appear from the following, viz.: "When insanity is pleaded in defense of a criminal act, it must be clearly shown to have existed at the time of the commission of the act;" and "that every person is presumed to be sane until the contrary is proved; and it is for him who sets up this defense to prove it by evidence which will satisfy the minds of the jurors that the party was insane at the time of the commission of the offense." And the court said, "This charge was undoubtedly correct." Upon comparison, these two decisions will be found to square exactly with the present jurisprudence of the English courts; and in criminal matters that jurisprudence is, by positive statutory enactment, made our guide. The statute provides that

"crimes, offenses, and misdemeanors shall be taken, intended and construed according to and in conformity with the common law of England; and the forms of indictment, the method of trial, the rules of evidence, and all other proceedings whatsoever in the prosecution of crimes and misdemeanors, changing what ought to be changed, shall be according to the common law, unless otherwise provided." Section 33 of Act 50 of 1805, p. 440; Rev. St., § 976. And the force of this rule is strengthened by the provisions of sections 993, 994 and 995 of the Revised Statutes, which declare that the plea of insanity raised upon the general issue is one for the jury to determine as an issue of fact; and, if same is sustained by proof, their verdict shall be "Not guilty." It is clear, then, that a reasonable doubt of the insanity of the accused would not satisfy "our statute," and the principle of the Davis case can not be applied in this state. The consequence is that in criminal matters this court must follow the decisions of the English courts as the best expression of the common law, in preference to those of the Supreme Court of the United States.

Adopting this as the correct guide, it becomes our duty to conform our jurisprudence thereto. In *State v. De Rance*, 34 La. Ann. 186, our immediate predecessors, as already intimated, receded from the position assumed in the Burns and Coleman cases, and upheld the first theory, *supra*. That decision has been quoted as authority only once by this court as at present constituted, and then it was merely cited without discussion in an uncontested case. *State v. Clements*, 47 La. Ann. 1088. Finding that decision—*State v. De Rance*—unsupported by the current and weight of American authority, and not in keeping with the English jurisprudence, I think it the duty of this court to formally and in terms overrule it and adhere to the theory maintained in *State v. Burns* and *State v. Coleman*. My examination of the decisions cited in the De Rance case does not impress my mind as they seem to have impressed those of our predecessors. In the first place, the Supreme Court of New Jersey, in a case of much more recent date than that of *State v. Spencer*, has most distinctly aligned itself upon the second theory, as will appear from *Graves v. State*, 45 N. J. Law, 203—decided in 1883, whereas the Spencer case was decided in 1846—in which the court say: "And indeed, so far as experience or tradition extends, it has been

the invariable course to instruct the jury that the law *ma facie* presumes mental sanity; and that when, in a given case, the prisoner would overcome such presumption, he must exhibit a clear preponderance of proof in favor of such defense." That this change in the course of decision by that court is conspicuous, appears from the fact that it has been noted and commented upon by Mr. Wharton. 1 Whart. Cr. Law, § 6, and note; Whart. Cr. Ev., §§ 336, 729. This change must have an important influence upon courts which have conformed their opinions to that theory; and indeed, this has been done, especially by the South Carolina court. Aligning the authorities cited in De Rance's case, I find, by making a comparison with the foregoing lists of cases which I have examined and cited, that all save one—*State v. Spencer*, 21 N. J. Law 202—are to be classed as favoring either the second or third theory, *supra*, and not the first, to which category the opinion is added them. Indeed, I find in the quotation selected by the court such expressions as "must be clearly proved," "on whom lies the burden of proof," "governed by the preponderance of testimony," "clear and satisfactory," "will satisfy the jury," "to the satisfaction of the jury," "must be satisfactory," and the like; but there is not found in any of them the statement that insanity must be proven beyond a reasonable doubt. 34 La. Ann. 188, 189. And yet the opinion undertakes to say, upon the faith of those authorities, that "the burden of proof on this plea rests upon the defense urging it, and its truth must be established beyond a reasonable doubt." Page 190, citing 27 La. Ann. 692. On the application for rehearing an additional opinion was rendered, refusing it, but there was no additional authority cited, the apparent effort being to reconcile the various expressions we have quoted with that of "beyond a reasonable doubt;" that is, to demonstrate that they are one and the same thing. The conclusion is irresistible, then, that if they are not one and the same thing, that opinion is wrong; and I have shown most conclusively, by all the authorities I have cited, that they are totally different, and irreconcilable altogether. Not only is that the case, but in the year 1883—the year subsequent to that in which the decision of De Rance's case was rendered—the very decision of the court upon which it mainly depends was altogether changed. 45 N. J. Law, 203. It follows, as a necessary consequence, that the instruc-

tions given by the trial judge to the jury were inconsistent and conflicting, and gave to the accused just ground of complaint; but that was not the fault or mistake of our learned brother of the district court, who merely conformed his views to those expressed by this court in the De Rance case.

BREAUX, J. (dissenting). Under the common law every man is presumed sane until the contrary be proven. Insanity, as a plea, should be proved as a substantive fact by the accused, on whom the burden of proof rests. Being of the opinion that the proof of insanity at the time of committing the act ought to be made as clear and satisfactory by the accused to secure his acquittal on the ground of insanity as the proof of committing the act ought to be made evident by the state in order to find a sane man guilty, I respectfully dissent. The foregoing rule is the English rule, announced by Mr. Wharton in his work on Homicide.

NOTE.—*Presumption of sanity and burden of proof.*—In a very able and elaborate note to the foregoing case, in volume 36, page 721 of the Lawyers Reports Annotated, in which the question of insanity is discussed in many of its phases relative to criminal and civil procedure, it is said that the rule of the principal case is practically universal, and has been repeatedly laid down in general terms, that every person is presumed to be sane until the contrary appears. In support of which the following cases are cited: *Ethridge v. Bennett*, 9 Houst. (Del.) 295; *Armstrong v. Timmons*, 3 Harr. (Del.) 342; *Duffield v. Robeson*, 2 Harr. (Del.) 375; *Frazer v. Frazer*, 2 Del. Ch. 260; *Humphreys v. State*, 45 Ga. 190; *Argo v. Coffin*, 142 Ill. 368; *Guild v. Hull*, 127 Ill. 523; *McCarthy v. Kearnan*, 86 Ill. 291; *Wallis v. Lohring*, 134 Ind. 447; *Rush v. Megee*, 36 Ind. 69; *State v. Coleman*, 27 La. Ann. 691; *State v. Burns*, 25 La. Ann. 302; *Chandler v. Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Ricketts v. Jolliff*, 62 Miss. 440; *Mullins v. Cottrell*, 41 Miss. 291; *State v. Wright*, 134 Mo. 404; *Perkins v. Perkins*, 39 N. H. 163; *Jackson, ex dem. Vandusen v. Vandusen*, 5 Johns. 144, 4 Am. Dec. 330; *Jackson, ex dem. Cadwell v. King*, 4 Cow. 207, 15 Am. Dec. 354; *Ean v. Snyder*, 46 Barb. 230; *Odum v. Riddick*, 104 N. C. 515, 7 L. R. A. 118; *Ballew v. Churk*, 2 Ired. L. 23; *Miller v. Rutledge*, 32 Va. 863; *Clark v. State*, 8 Tex. App. 350; *Smith v. State*, 23 Tex. App. 317; *Giebel v. State*, 28 Tex. App. 151.

The better rule would seem to be, where the charge against the accused is denied by him, that the presumption that every man is sane until the contrary is proved is not a presumption of law but one of fact, or at least a mixed presumption of law and fact to be governed by instructions. *Sutton v. Sadler*, 3 C. B. N. S. 87, 26 L. J. C. P. N. S. 284, 3 Jur. N. S. 1150.

It has its practical application in imposing the burden of proof upon him who sets up insanity, but the presumption is not to be weighed against any measurable amount of evidence. *State v. Jones*, 64 Iowa, 356.

And it is to be regarded as merely a matter of evidence standing upon the same ground as the testimony of a witness; it does not shift the burden of proof in the sense of changing the rule as to the quantity of evidence, but is simply *prima facie* proof of sanity upon which, other things being shown, the jury may find a verdict. *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154.

The discharge of a person from the insane asylum who had been transferred from the penitentiary creates the presumption in favor of his recovery. *Langdon v. People*, 133 Ill. 382.

A person who has been deaf and dumb from his birth is deemed to be *non compos*, but the rule is different where he becomes so from accident. *Yong v. Sant*, 1 Dyer, 56a.

But the doctrine that a person born deaf and dumb was deemed to be an idiot has been abandoned, and the question of such a person's ability to contract now rests upon his mental capacity. *Barnett v. Barnett*, 1 Jones Eq. 221; *State v. Howard*, 118 Mo. 127.

A person who was deaf and dumb from his nativity is not therefore an idiot or *non compos mentis*, though such perhaps may have been the legal presumption at common law. *Brower v. Fisher*, 4 Johns. Ch. 441. And see also *State v. Draper*, Houst. Crim. Rep. (Del.) 291, and *King v. Steel*, 1 Leach C. C. 451.

Every person is presumed to intend the usual and actual consequences of his acts. *Sanders v. State*, 94 Ind. 147. And before a plea of insanity can be allowed to prevail as an excuse for a criminal act satisfactory evidence must be offered that the accused was so affected with insanity at the time of its commission that he was incapable of appreciating its enormity. *Fisher v. People*, 23 Ill. 283; *State v. Hartley* (Nev.), 28 L. R. A. 33.

And an instruction in a criminal action that the jury is to presume the defendant innocent until his guilt is established by evidence beyond a reasonable doubt is not inconsistent with another instruction that every man is presumed to be sane and to intend the natural and ordinary consequences of his acts. *Greenley v. State*, 60 Ind. 141. The criminal act itself, however, should not be considered as raising a presumption of insanity. *Beasley v. State*, 50 Ala. 149.

Proof of the killing on a prosecution for murder raises a presumption that the accused was criminally responsible for it, though he was born deaf and dumb and had never received special religious and moral instruction. *State v. Draper*, Houst. Crim. Rep. (Del.) 291.

Although one who was a deaf mute from nativity is in contemplation of law incapable of guilt upon the presumption of idiocy, yet that presumption may be repelled by evidence of that capacity to understand by signs and tokens which persons thus afflicted frequently possess to a very great extent. *King v. Steel*, 1 Leach C. C. 451.

While the general rule as to the burden of proof is not universally applied in prosecutions for criminal acts, the majority of the cases adopt the theory that the plea of insanity is an affirmative defense. *State v. Lewis*, 20 Nev. 333; *Brotherton v. People*, 75 N. Y. 159; *Com. v. Bezek*, 168 Pa. 603.

And hold, with the principal case, that the burden rests with the accused to prove it and rebut the presumption of sanity and criminal responsibility. *Parsons v. State*, 81 Ala. 577, 7 Am. Cr. Rep. 266; *Bolling v. State*, 54 Ark. 588; *People v. Ward*, 105 Cal. 335; *State v. Hoyt*, 47 Conn. 518; *State v.*

Harrigan, 9 *Houst.* (Del.) 369; *Carr v. State*, 96 *Ga.* 284; *Moore v. Com.*, 92 *Ky.* 630; *State v. Clements*, 47 *La. Ann.* 1088; *Com. v. Eddy*, 7 *Gray*, 583; *State v. Hanley*, 34 *Minn.* 430; *State v. Brown*, 12 *Minn.* 538; *Bonfanti v. State*, 2 *Minn.* 123; *Ford v. State*, 73 *Miss.* 734, 35 *L. R. A.* 117; *State v. Schaefer*, 116 *Mo.* 96; *State v. Lewis*, 136 *Mo.* 84; *State v. Lewis*, 20 *Nev.* 333; *State v. Spencer*, 21 *N. J. L.* 196; *Faulkner v. Territory*, 6 *N. M.* 464; *Brotherton v. People*, 75 *N. Y.* 159; *State v. Davis*, 109 *N. C.* 780; *State v. Potts*, 100 *N. C.* 457; *State v. Payne*, 86 *N. C.* 609; *Kelch v. State*, 36 *Ohio L. J.* 267; *Bergin v. State*, 31 *Ohio St.* 111; *Com. v. Bezek*, 168 *Pa.* 603; *State v. McIntosh*, 39 *S. C.* 97; *Dove v. State*, 3 *Heisk.* 348; *Leache v. State*, 22 *Tex. App.* 279; *People v. Calton*, 5 *Utah*, 451; *Baccigalupo v. Com.*, 33 *Gratt.* 807; *United States v. Lancaster*, 7 *Biss.* 440; *United States v. Ridgway*, 31 *Fed. Rep.* 144; *Reg. v. Layton*, 4 *Cox C. C.* 149; *Reg. v. Stokes*, 3 *Car. & K.* 185.

Unless insanity appears from the evidence offered by the state. *State v. Danby*, *Houst. Crim. Rep.* (Del.) 166; *People v. Calton*, 5 *Utah*, 451.

And one who alleges insanity as a defense in a criminal prosecution must prove it as other material allegations are proved. *State v. Starling*, 6 *Jones L.* 366.

It must be shown by the accused, and where he offers no testimony tending to show it the presumption in favor of sanity remains rebutted. *State v. Norwood*, 115 *N. C.* 791; *McKenzie v. State*, 26 *Ark.* 334.

The defendant in a criminal action who relies upon insanity as a defense has the affirmative, and before it can be availed of he is bound to establish, not only the fact of insanity, but insanity arising from such a cause as in point of law amounts to a defense. *People v. Bell*, 49 *Cal.* 485.

Sanity is presumed, and where insanity is alleged as a defense in a prosecution for crime, it devolves upon the accused to prove that he was insane and incapable of rational action to such an extent as to render him irresponsible at the time. *Com. v. Werling*, 164 *Pa.* 559; *King v. State*, 9 *Tex. App.* 558.

Where the killing is established on a trial for murder it devolves upon the accused to prove that he was in such a condition at the time the deed was done as not to know the consequences of his act, and not to know right from wrong. *Casat v. State*, 40 *Ark.* 511; *Humphreys v. State*, 45 *Ga.* 190; *State v. Payne*, 86 *N. C.* 609.

So, the burden of proof of partial insanity alleged as a defense in a criminal prosecution rests with the accused, and it must be proved like any other fact, to overcome the presumption of sanity. *State v. Pratt*, *Houst. Crim. Rep.* (Del.) 249.

An allegation of temporary insanity as a defense in a criminal prosecution casts the burden upon the accused to prove that the criminal act was committed at a time when he was actually insane. *Kinlock's Trial*, 25 *How. St. Tr.* 891, 997.

So, one who interposes a plea of inability to control his own actions as a defense to a prosecution for any act of personal violence has the burden of proof to show such inability. *State v. Reidell*, 9 *Houst.* (Del.) 470.

And where the commission of a crime is admitted, and insanity is alleged as a defense, the burden rests with the accused to establish insanity or want of moral power to resist the impulse to commit the crime. *Brown v. Com.*, 78 *Pa.* 122.

And the fact that some controlling disease was the acting power within the accused, which he could not resist, or that he had not sufficient use of his reason to control the passions which prompted the act, does not relieve him from responsibility. *State v. Coleman*, 27 La. Ann. 691.

And where a jury is impaneled at the instance of the accused in a criminal prosecution to try the question of his sanity at the time he is brought up to plead to the indictment, the burden of proof of insanity rests with the accused. *Reg. v. Turton*, 6 Cox C. C. 385; *State v. O'Grady*, 3 Ohio Legal News, 137.

So, where irresponsible drunkenness is relied upon as a defense to a prosecution for crime, the burden of proving it rests with the accused. *State v. Grear*, 29 Minn. 231; *Fouville v. State*, 91 Ala. 39.

The burden rests with him to show that his reason was dethroned, or that he was in such a condition as to be incapable of conceiving any intent. *Com. v. Hart*, 2 Brewst. (Pa.) 546; *Fouville v. State*, 91 Ala. 39.

And the burden of proving that he was in such a condition of intoxication as to render him incapable of doing a wilful, deliberate, and premeditated act rests with the accused in a prosecution for murder. *Honesty v. Com.* 81 Va. 283.

So, the burden of proof rests with one who relies upon insanity as an excuse for crime to establish that the insanity was caused by an habitual and long-continued intemperate use of ardent spirits, and not as an immediate result of intoxication. *People v. Bell*, 49 Cal. 485.

And delirium tremens alleged as a defense in a criminal prosecution must be established by the accused by evidence proved to the satisfaction of the jury. *State v. Thomas*, Houst. Crim. Rep. (Del.) 511.

And the burden rests with the defendant in the appellate court on an appeal from a conviction in a criminal case in which it was found that the defendant was not insane, to show that there was a preponderance of evidence in favor of the defense. *Hoard v. State*, 15 Lea. 318.

The contrary rule.—The plea of insanity as a defense in a criminal prosecution is merely a denial of one of the essential allegations against the accused, and does not cast the burden of proof of its existence upon the defendant. *Hopps v. People*, 31 Ill. 385.

Within this rule it is incumbent upon the prosecution to prove the presence of every ingredient necessary to constitute the crime charged including the necessary soundness of mind. *Com. v. Gerate*, 145 Pa. 289; *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *Armstrong v. State*, 30 Fla. 170, 17 L. R. A. 484; *Russell v. State*, 53 Miss. 367; *Ballard v. State*, 19 Neb. 619; *Wright v. People*, 4 Neb. 407; *O'Connell v. People*, 87 N. Y. 377; *Brother-ton v. People*, 75 N. Y. 159; *Davis v. United States*, 160 U. S. 469; *Dacey v. People*, 116 Ill. 555.

And at the moment of the commission of the criminal act the accused had reason, apprehension, and understanding sufficient to enable him to discern right from wrong. *Moett v. People*, 85 N. Y. 373.

So, the burden of proof in a prosecution for homicide in which the killing is not denied, but it is claimed that there was no malicious intent because of the insanity of the accused, to show such malicious intent rests with the state, and the accused is not entitled to the opening and closing of the argument. *State v. Felter*, 32 Iowa, 49.

But an instruction in a prosecution for assault with intent to kill, that the defendant is presumed to be sane until he convinces the jury by the evidence that he is insane, is not error where he has been tried upon the theory that the burden rested with the prosecution to maintain the person's sanity. *O'Connell v. People*, 87 N. Y. 377, 41 Am. Rep. 379.

And the adoption of the language of an opinion in another case in charging the jury in a criminal prosecution that to establish a defense of insanity it must be clearly proved, is not error where the court elsewhere charged the jury that the burden of establishing beyond a reasonable doubt as one of the elements of guilt that the accused was not insane is cast upon the prosecution. *Walker v. People*, 88 N. Y. 86.

The presumption of mental soundness continues until some evidence has been offered tending to overthrow it, however, and the state is not in the first instance bound to introduce evidence to prove sanity. *Sanders v. State*, 94 Ind. 147; *Montag v. People*, 141 Ill. 75.

And it will of itself sustain the burden of proof which is devolved upon the state until it is rebutted and overcome by satisfactory evidence to the contrary. *King v. State*, 9 Tex. App. 558; *Com. v. Eddy*, 7 Gray, 583.

Sanity, being the normal condition, is presumed, and the prosecution in a criminal case may rest upon the presumption without other proof, and whoever denies it must prove his allegation; but when the presumption of sanity and the evidence are all considered the prosecution holds the affirmative. *Brotherton v. People*, 75 N. Y. 159; *McDougal v. State*, 88 Ind. 24.

The state in a criminal prosecution has the burden of showing the sanity of the accused at the time of the commission of the criminal act, but the presumption of sanity is sufficient to sustain the burden of proof where the accused offers no testimony to meet the presumption. *Ford v. State*, 73 Miss. 734, 35 L. R. A. 117.

And a statute providing that the defense of insanity shall be set up by special plea does not change the rule. *Sanders v. State*, 94 Ind. 147.

Every man is primarily presumed to be sane, and where nothing in the testimony suggests otherwise, there is no obligation to establish his sanity in a criminal action, but when the proof warrants a reasonable doubt of it it devolves upon the state to remove that doubt and establish sanity. *Cunningham v. State*, 56 Miss. 260, 31 Am. Rep. 360.

The state is not required, in the first instance, to introduce evidence to prove sanity, but if evidence is introduced which tends to shake the presumption of sanity the jury must then consider the same and its effect upon the main issue of guilty or not guilty together with the presumption of sanity, the presumption of innocence, and other legal presumptions applicable to the case, and if there should be reasonable doubt as to whether the defendant was sane or insane, he must be acquitted. *State v. Crawford*, 11 Kan. 32.

And where there is proof of insanity, whether on the part of the government or of the accused, it is incumbent upon the prosecutor to establish all the elements constituting the offense, including the necessary soundness of mind. *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *Furst v. State*, 31 Neb. 403; *Walker v. People*, 1 N. Y. Crim. Rep. 22; *Armstrong v. State*, 30 Fla. 170, 17 L. R. A. 484; *Montag v. People*, 141 Ill. 75; *State v. Crawford*, 11 Kan. 32; *Com. v. Eddy*, 7 Gray, 583; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Cunningham v. State*, 56 Miss. 260; 31 Am. Rep. 360;

Walter v. People, 32 N. Y. 147; *O'Connell v. People*, 87 N. Y. 377, 41 Am. Rep. 379; *Com. v. Gerade*, 145 Pa. 289; *McAllister v. Territory*, 1 Wash. Terr. 360; *O'Brien v. People*, 48 Barb. 274; *King v. State*, 9 Tex. App. 558.

It is then required to prove sanity as a necessary element to constitute crime. *Jamison v. People*, 145 Ill. 357.

And establish that the accused possessed sufficient mental capacity to comprehend the nature of the act complained of. *Furst v. State*, 31 Neb. 403.

Evidence tending to show the insanity of the accused in a criminal case does not shift the burden of proof upon the prosecution, however, unless it is sufficient to create a reasonable doubt as to his sanity. *People v. Finley*, 33 Mich. 482; *Jamison v. People*, 145 Ill. 357.

And proof of insensibility to the consequences of his acts on the part of a person accused of homicide, and of absence of apparent motive, is not such evidence of insanity as will cast the burden upon the state of affirmatively showing that the accused was sane at the time. *State v. Redemier*, 8 Mo. App. 1.

Nor is evidence in a criminal prosecution that the defendant was in trouble with his family, and was disturbed in mind and perhaps somewhat excited, sufficient to raise a reasonable doubt in regard to his sanity which will require the people to establish his sanity in order to convict. *Montag v. People*, 141 Ill. 75.

And the fact that the state as a part of its case has introduced evidence of the mental condition of the accused in a criminal prosecution tending to raise an inference that he was incapable of forming a criminal design, and that such inference has been strengthened by the defendant's evidence, does not cast upon the state the burden of proving the defendant's sanity beyond a reasonable doubt. *State v. Hansen*, 25 Or. 411.

But evidence upon the prosecution of a man for an assault upon his wife with intent to kill, tending to show that he was perfectly rational and acted from motives of revenge, and of letters sent her after the act trying to effect a reconciliation, tending to show that he appreciated the character of his act and was trying to prevent her from testifying against him, *prima facie* establishes his sanity, and casts the burden upon him to disprove it, though the prosecution asked no questions on the trial as to his sanity. *Lilly v. People*, 148 Ill. 467.

FRENCH V. STATE.

(93 Wis. 325.)

MURDER: *Change of venue—Insanity—Trial of issue—Evidence—Drunkenness—Delirium tremens.*

1. Under a statute providing for application by petition, in a criminal case, for a change of venue, and where a change of venue is applied for on account of the prejudice of the judge, the court may, in lieu of awarding a change of venue, make a request of the judge in an adjoin-

- ing circuit to hold the court where the case is pending, and try the same; defendant can not couple his application for a change of venue with a condition that the case be not sent out of the county.
2. A statute which provides for an inquisition where there is a probability that the accused is, at the time of his trial, insane, and thereby incapacitated to act for himself, to determine whether he is so insane, which is in affirmance of a power of the court at common law, is in aid of, and not in derogation of, the bill of rights, securing to accused a fair and impartial trial, the result of the inquisition having no legal effect on the main issue.
 3. Under such a statute, providing that, when the jury disagree on the trial of the special issue of accused's insanity at the time of the commission of the alleged offense, the court shall forthwith order the trial on the issue of not guilty to proceed, and the question of insanity involved in such special plea "shall be tried and determined by the jury with the plea of not guilty," defendant can not have a second trial on the special issue, there having been a disagreement on the first.
 4. The jury having disagreed on the special issue of insanity, defendant can not obtain the affirmative of the issue of his sanity or insanity, and the right to open and close, by admitting the homicide, and alleging in defense his insanity at the time thereof.
 5. Exclusion of evidence of defendant's acts, conduct, and declarations subsequent to the fourth day after the homicide, showing the continuance of his condition the same as immediately before the homicide, offered on the question of his insanity at the time of the killing, is error, especially where it was claimed by the prosecution that his condition at the time of the killing was the result of protracted and excessive intoxication, producing a fit of drunken excitement and fury.
 6. In a homicide case it is error to admit testimony that a man suffering from delirium tremens has no more control over his actions in that respect than a man suffering from delirium produced from any other cause, but still he is sane; as, while drunkenness is no excuse, delirium tremens caused by drunkenness may be an excuse, if it produces such a state of mind as would, if otherwise produced, relieve the person from responsibility.

Appeal from Circuit Court, Ashland County; John K. Parish, Judge.

William G. French was convicted of murder, and brings error. Reversed.

A former conviction of the plaintiff in error for the murder of Gavin M. Steele was reversed, and a new trial granted. 85 Wis. 400. The case came on for another trial, when an affidavit of the defendant was filed that the circuit judge was prejudiced, and a motion was made for a change of venue to Chippewa county, which was granted, but the order was subsequently vacated by consent. The court required the

defendant to elect whether he would withdraw the affidavit of prejudice which had been filed, or whether he would move thereon for a change of venue. The defendant's counsel then withdrew the affidavit, without prejudice to his right to file another before the trial commenced. Subsequently the defendant moved to refile the affidavit, and renewed the motion for a change of venue, on condition that the court should not send the case out of the county, and that unless the court called in another judge to try the case the defendant withdrew his affidavit and motion. The court held that the motion must be made in the usual form, and unconditionally, and overruled the motion as thus made. The district attorney filed an information that there was a probability that the defendant was then insane, and suggesting that an inquisition be made as to his sanity. The defendant's counsel objected on the ground that the defense of insanity would be made, and that Sec. 4700, Rev. St., providing for such inquisition, was in conflict with Sec. 7, Art. 1, Const. Wis., and void, and demanded that the trial proceed on the issues already formed. The objections and demand were overruled. The jury, upon such inquisition, found the defendant sane enough at that time to stand his trial. A special plea of insanity at the time of the commission of the alleged offense was interposed, upon which issue was taken. The defendant filed his affidavit alleging that W. F. Shea, proposed as assistant prosecutor, for various reasons, was not a proper person to act as such, and considerable evidence was adduced upon this point. The court held that he was not retained by any private person in this case, or any other founded on the same facts, and, as he was otherwise competent, overruled the objections. A trial was then had upon the issue of insanity, and the jury failed to agree and were discharged. Another jury was then impaneled to try the defendant on the general plea of not guilty, and the question of the defendant's sanity, as involved therein, as required by the statute (Sanb. & B. Ann. St. § 4697). The defendant's counsel asked that the court proceed to another trial on the special plea, but this request was denied. The defendant's counsel then moved to admit the homicide, and to allege in defense that the defendant was insane at the time, but upon the express condition that such admission should give him the affirmative of the case; but the district attorney refused to accept the proposition, and

the court held that the state would take the burden of proof, and proceed in the usual way.

The circumstances of the killing, which took place March 5, 1891, in the drug store of the deceased, as shown on the part of the state, were, that French came in and made a demand of Steele for some money the latter had for safe keeping, which he repeated. Steele asking Mrs. French, who was present, if he should give French the money, she said, "No, no, Will; you don't need it." French said to Steele, "G-d d---n you! I will make you give it to me." Steele said, "You know that you can't make me give it to you." French then drew a revolver from his pocket, and said, "Steele, G-d d---n you, die!" and shot him. He shot at Steele three times. They were face to face, about eight or ten feet apart. Steele died almost instantly. About a minute after French came and looked at him, and said "Poor Gavin! The best friend I or my family ever had!" Others testified to the same statement. There were several witnesses to the killing. Two testified that French said, after the shooting, "He has always been a traitor in our family." The witnesses said that French seemed excited, angry; some of them, that they thought he was under the influence of liquor—his eyes looked bright, inflamed. They all thought him sane, from what they knew and saw of him. The evidence tended to show that French had been given to excessive drinking, and Steele and others had put up powders to relieve him; that he insisted on having morphine powders, and they gave him quinine instead. Dr. Reinhart testified to seeing French on the day of the homicide, and in the afternoon at the jail; that, up to the time of the homicide, he saw nothing that would cause him to believe him insane. At the jail his actions were not those of a man in his right mind. He was very much excited and nervous; wanted bromide to quiet him. He went on talking about the trouble in a rather incoherent and excitable manner. He said he was right in the matter; that God had directed him. Mentioned certain little improprieties that were going on in his family, and he thought Steele was assisting persons to carry them out. His conversation was such as you might expect from a man not mentally sound. His appearance and actions were not those of a man in his right senses, but there was an excitement which would cover up the ordinary symptoms of insanity. Very considerable evidence was given

on the part of the state, by non-experts, tending to show that in their opinion the defendant was sane at the time previous to the homicide when they conversed with him. The cashier of the Northern National Bank testified to his calling on him on the morning in question to get a loan of money; had various deals with him; judged he was under the influence of liquor but thought he was sane. Louise Doucette testified: That she was working at the defendant's house the day Steele was shot. That the defendant came home at 11 o'clock in the forenoon; wanted a cup of coffee; said he was going up to Steele's, and if Steele did not give him his money he would shoot him. Steele was taking his meals at defendant's house at the time. A Mr. Duket had been boarding there up to within about three weeks. That the defendant had been often under the influence of liquor, particularly just before the shooting. On cross-examination she testified that when he came to the house that day he looked wild, his eyes were glassy, and he looked pale, and was trembling. He said: "The devil has always been before me and now he has got to get behind me." Two days before he said: "Louise, things have been getting pretty serious at the house for some time," and she told him "Yes." Asked if she saw Duket stroke Mrs. French's face, and she told him "Yes." He talked about powders being put in his coffee that made him sick. This was before he went to Marengo. Two hypothetical questions, of considerable length, founded on the evidence as claimed by the prosecution, were propounded to an expert witness of extensive experience, who testified that he did not see in the facts embraced in them any evidence which indicated to his mind that the defendant was insane; that in his opinion the defendant was sane.

On the part of the defense, considerable evidence was given tending to show insanity on the part of the defendant before and when the homicide occurred. One Rea, his brother-in-law, testified that he came to his house in the afternoon four days before the homicide. Was very much excited, and seemed in great trouble. He burst out crying, then he would curse a while, and would pray a while. Said he had great trouble in his family; there were parties trying to ruin his home. He was very much excited, and looked dangerous. His eyes were glassy looking, and he trembled and seemed very nervous. He

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said Gavin M. Steele and Duket were trying to ruin his home, and he spoke incoherently. The burden of his song was that Steele and Duket were trying to conspire against him, to ruin his home and family. Said he had been shot at, and the ball passed over his shoulder, when he was on the way to the camp at Marengo. He remained at the house of witness during the night, and until 8 or 9 o'clock the next morning. Saw him quite often during the night, and there was no change in his condition, the strain of his conversation being that Steele and Duket were trying to wreck his home. There was nothing to indicate that he was in a state of intoxication, or that he had been drinking. Thought he was insane, but knew he had been periodically addicted to the use of liquors for years. He did not undress, but his father laid down on the bed beside him, and his sister also stayed with him. Mrs. Rea's evidence was to the same effect, and that the defendant said Steele had given a dirk knife to Nugent to kill him, and his life was in danger; that they were conspiring to kill him, and he could not turn around but he met these things face to face; that powders had been given by his wife, or Steele, to curse or kill him. He raved all night—all about his family troubles—his wife; his children were homeless, and Duket was trying to take his place; that his home was wrecked and ruined, and his peace of mind gone. She thought he was insane. He got up in the night to take his revolver from her, and put it back in his coat pocket, and said, "Leave it alone," and he watched it all night—kept his eye on it. He got up a second time to see if the detectives were watching his house. He had two of them watching his house. He said he had hired them to watch Duket, and see that he did not enter his home. The defendant's father gave similar evidence, and that Duket frequently went to see Mrs. French, and was very attentive to her, while the defendant was absent at his camp; that she and Duket were sitting up from 2 to 4 o'clock in the morning; that he remonstrated with her, but to no effect, and tried to get Steele to assist him, but he told them, "Sit up as long as you like but get up in the morning;" that he told defendant about it and defendant warned Duket not to have anything to do or say to his wife, and not to speak to her if he met her on the street. Duket answered, "Why ask me to do a thing I can't help

doing?" Finally defendant, in February, ordered Duket out of his house, and took a gun, in order to shoot him, as he supposed, but witness got it from him. That he thought the defendant insane. The night before the shooting the defendant slept at some boarding house. In the morning he told witness that he was going to demand that money of Steele, about \$500, that he had turned over to his wife for safe keeping. He had been addicted to the use of liquors for years, and on some occasions drank to excess. William Seeger, employed at defendant's lumber camp, and who came from there with him, March 1st, to the house of Rea, his brother-in-law, testified to the effect that February 24th, at the camp, defendant desired witness to arrest parties who had, he said, been shooting at him, and pointed out a stump as one who had shot at him. His eyes looked wild, and stuck out large, and he was very blue in the face. That night, after he had laid down he jumped up and went to the window, and said he could see the one who was going to shoot him. It was only a tree. He required blankets to be nailed up at the windows, so no one could look through. About the middle of the night, heard him out doors, and he came in pretty near frozen to death. He said there was a conspiracy to use him up and get rid of him; that Duket and Steele were in the conspiracy. He went out of the camp that morning, and returned towards evening. He said: "I have got now to the bottom of all my troubles. Steele is at the head of everything." He looked kind of queer and wild. Went with him to Ashland, March 1st, and he returned to camp again. The day before the shooting, witness and one Nugent went with him to Ashland. Saw him at 11 o'clock the next day at the Colby House. He was to return to the camp after dinner. All at once he jumped up and left witness. His eyes looked very dim and wild—blurred like. Witness thought him insane. Other witnesses testified, in substance, the same as to what occurred at the camp. One Armstrong testified to meeting the defendant on the sidewalk on the morning of the homicide. That he tapped witness on the shoulder, and said, "Ben, they are trying to do me up." That he had quite a wild look, and, from the look of his eyes, he did not care to remain in his company. That they walked along a little way, and he asked witness to take a drink with him, and witness said to him: "You have had enough. You

had better go on down home." Thought he was bordering on delirium tremens, or was coming out of it, something of the kind. Had thought many times he was not in his right mind, and was still of the same opinion. Robert Patriek saw defendant, on the day of the homicide, between 10 and half-past 11, at the Colby House. He grabbed witness by the hand and said, "How do you do?" He was a little wild, and said: "I am having trouble. I opened my doors, my home, to him, and made a friend of him, and they are trying to rob me out of my money and my home." He was talking a little loud; turned to the left and went to talking to his father. He looked wild, his eyes were bright and glassy, and "I saw at once he was off his base a little. He was pale, and think he was insane." Several other witnesses testified to the same or similar declarations and conduct of the defendant shortly preceding the day of the shooting. Robert McDonald, prison guard at the Ashland jail, testified to seeing the defendant the first day he was brought to the jail; that he looked wild and excited, and talked and raved a good deal about his family trials and troubles, snakes and vipers, and such talk as that—about a conspiracy to injure his home, and rob him of his wife and property. Spoke of it as if it had been going on for a long time. Mentioned Duket's name in it, and the name of Mr. Steele in the conspiracy. The next day he wanted to go down town, and persisted in it. He was excited, wild, kind of crazy, sometimes. Sometimes he was quite sensible. On the following day there were some spells that he seemed to be sane. When something was said in regard to his troubles or family affairs, he seemed to become insane. On the fourth day there was no material change, as compared with the third day. Defendant's counsel asked, "How was he on the following day?" This was objected to as incompetent, irrelevant, and immaterial, and too remote in time. The objection was sustained, the court stating, in substance, that the defendant's counsel would be precluded from showing his condition on the fifth day; adding, "I am willing for you to show his appearance about that time, without there is some radical change." Witness saw defendant daily from the time he was committed to jail, March 5, 1891, to the time he was taken away after the trial, the latter part of May, or the early part of June, 1891. He was asked by defendant's counsel to

describe his appearance and conduct during that period. This was objected to and the objection was sustained. The defendant's counsel then offered to prove by the witness that he saw the defendant daily from March 5, 1891, until the beginning of his trial, in May of that year, and from then until he was taken to the state prison, about the middle of June, 1891; that the appearance and conduct of the defendant during all that time was the same as it was on the day of the homicide, and the days succeeding, concerning which the witness had testified; that his eyes had the same appearance, and his conduct and talk were of the same character, in reference to the same subject. The court stated that it did not think there was anything in this, new; that it could see no reason why it should be admitted, as it was merely cumulative. Clarence Snyder, the president of the state board of control, testified that the board meets at the state prison four times a year; that he saw the defendant a number of times between July 1, 1891, and June, 1893, and he appeared before the board at times. At the suggestion of the court, and with the assent of the district attorney, the defendant's counsel offered to prove by the witness that the defendant appeared before the board to present to it reasons why he should be given his liberty, and that on several occasions of the kind the defendant deported himself in a manner that convinced the witness that he was insane; that his appearance, the brightness of his eyes, the pallor of his face, trembling of his person, and his unstable manner and methods of presenting his case, contributed to that belief; that, in support of what he termed his constitutional rights, he presented a Bible and Blue Book of Wisconsin; that on one occasion, when allowed to present his case, he presented a disjointed harangue, and discussed his belief in the existence of a conspiracy of which Steele and Duket were members, to break up his home and destroy his family; that he became so violent on one occasion, in presenting his case, about April 1, 1893, that he had to be forcibly carried from the presence of the board by the officers of the prison; and that, at the times mentioned, witness believed the defendant was insane. Objection being made, the court excluded the offered evidence. The defendant's counsel made the same offer, somewhat more in detail, to prove the same matters by

Mr. Jones, another member of the board, and also by Mr. Brown, the prison chaplain. These offers were also rejected. A medical expert of extensive experience testified, in answer to a lengthy hypothetical question, that he should say that on the day of the homicide the defendant was insane. The defendant was found guilty of murder in the second degree, and, having been sentenced accordingly, he brought this writ of error.

E. J. Dockery, for plaintiff in error.

Richard Sleight and *J. L. Erdall*, Asst. Atty. Gen., for the State.

PINNEY, J. The right to a change of venue depends entirely upon the statute. It is not guaranteed by Const. Art. 1, § 7, or any other provision of the constitution. As the right exists only by virtue of the statute, a change of venue can be had only upon the terms the statute prescribes. The statute (Sanb. & B. Ann. St., § 4686a) provides that when a change of venue, in any criminal case in any court of record in this state, "shall be applied for in any such court in the manner provided by law, on account of the prejudice of the judge thereof, such court may, in lieu of awarding a change of venue therein," make a request of the circuit judge in an adjoining circuit to hold the court where such action is pending, and try the same. By section 4680 it is contemplated that the application may be by petition. The right to a change of venue is thus made, by the statute, subject to the right of the court, in its discretion, to call in some other judge to try the action, in which case no change for that cause is to be awarded. The statute does not authorize the defendant to make an application for a change of venue, coupled with the condition that the court shall not send the case out of the county, or shall call in another judge to try it, thus dictating to the court its action upon a subject which the law has confided solely to its discretion. The filing of an affidavit of prejudice of the circuit judge, coupled with such condition, did not deprive the court of jurisdiction to proceed with the trial, but was, in law, equivalent to a request not to order a change of venue. The defendant can not assign as error the fact that the court complied to that extent with his request, and it was

therefore a matter of choice, and not of compulsion, that the defendant went to trial with the affidavit of prejudice of the circuit judge on file.

The statute (Rev. St., § 4700) providing for an inquisition, where there is a probability that the accused is, at the time of his trial, insane, and thereby incapacitated to act for himself, to determine whether he is so insane, is substantially a provision in affirmance of a power the court had at common law in such cases, as abundantly appears from the authorities. 4 Bl. Comm. 24, 25; *Crocker v. State*, 60 Wis. 556, and cases cited. This provision is in aid of, and not in derogation of, the constitutional provision (article 1, § 7) securing to the accused a fair and impartial trial. The result of such inquisition can have no legal effect upon the main issue.

We have considered the evidence, by affidavits and otherwise, upon the subject whether W. F. Shea was a proper and competent person to assist the district attorney in the prosecution of the case. We adhere to what was said in *Biemel v. State*, 71 Wis. 444, 451, that courts, in administering chapter 354, Laws 1887, "should permit or select only such assistants as are unprejudiced and impartial, as the prosecutor provided by law;" and we are unable, from the evidence, to say that the discretion of the court was not fairly exercised in this respect, or that the appointment was not one proper to be made. There is no reason to think that Mr. Shea was not as unprejudiced and impartial as the prosecutor provided by law. There was no error in appointing him.

After the jury had failed to agree on the special issue of insanity of the defendant, a request on his part that the court proceed to another trial on that issue was properly denied, as the statute provides, in such event, the court shall proceed to trial on the main issue when the question of insanity, involved in such special issue, "shall be tried and determined by the jury, with the plea of not guilty." Rev. St., § 4697, as amended by Ch. 164, Laws 1883. There was no error in refusing to permit the defendant to admit the homicide in order to obtain the affirmative of the issue of his sanity or insanity, involved in the special issue with the general plea of not guilty, or in refusing to allow the defendant the opening and closing on such trial. Where the jury have disagreed on the trial of the special plea of insanity, the trial that follows is to be conducted in like man-

ner as before the statute, and in all respects as therein provided; and the general verdict of guilty will conclude the special plea of insanity, as well as the plea of not guilty. But, if it is found that the accused was insane at the time of the commission of the alleged offense, the statute requires that the jury shall also find if he is now sane. This is with the view of determining the question of his future restraint. The statute does not warrant any method of pleading or practice upon the trial of the plea of not guilty that would change the right of opening and closing from that which existed before it was enacted. To have allowed the defendant's request would have been equivalent to permitting the defendant, in substance, to make an admission of the homicide, and, specially pleading or insisting upon any matter really included in the plea of not guilty of the crime charged, as, that he committed the homicide in self-defense, or the like, to obtain the opening and closing of the case. Such a practice is wholly unauthorized by the statute regulating pleadings and trials in criminal cases. The validity of Chap. 164, Laws 1883, in respect to specially pleading the defense of insanity, and the method of trial of such issue, as well as of the plea of not guilty, was fully sustained in *Bennett v. State*, 57 Wis. 69.

The exclusion of evidence offered on the part of the defendant, of his acts, conduct, and declarations occurring subsequent to the fourth day after the homicide, and offered as bearing upon the question of his insanity, was, we think, plainly erroneous. It is very generally agreed that evidence of the acts, conduct, and statements of the accused after, as well as before the homicide, are admissible to show the mental condition of the accused, and as bearing upon the question of his sanity. 2 Greenl. Ev. Sec. 371; 1 Bish. Cr. Law, Sec. 385; Busw. Insan., Sec. 216; *Grant v. Thompson*, 4 Conn. 203; *Freeman v. People*, 4 Denio, 9; *People v. Wood*, 126 N. Y. 249; *State v. Lewis*, 20 Nev. 333, 342. Such evidence is admitted on the ground that the facts are "so connected with or correspond to evidence of disordered or weakened mental condition preceding the time of the commission of the offense as to strengthen the inference of continuance, and carry it by the time to which the inquiry relates, and thus establish its existence at that time, or whenever they are of such a character as of themselves to indicate unsoundness to such a degree, or of so

permanent a nature, as to have required a longer period than the interval for its production or development." *Com. v. Pomeroy*, 117 Mass. 143, 148; *Bolling v. State*, 54 Ark. 588; *Com. v. Trefethen*, 157 Mass. 180, and cases cited. The evidence offered appears to have been rejected because it related to matters subsequent in point of time, that it was cumulative, that it was evidence of the defendant's own conduct while under confinement charged with the crime, offered in his own favor, and that it related to matters occurring after four days from the commission of the offense. While such evidence is competent, and from it the state of mind or insanity of the accused may be inferred, it may relate to actions or declarations so remote in time, or so altered in import and effect by intervening changes in the condition and circumstances surrounding the party, as to be wholly destitute of probative force, and for that reason, in the exercise of a wise discretion in the trial court, may be rejected. *Shailer v. Bumstead*, 99 Mass. 130; *State v. Leekman*, 2 So. Dak. 171. Still such discretion is not an absolute one, but the exercise of it when the facts appear, is subject to revision in this court. *Com. v. Trefethen*, 157 Mass. 180, 183. Whether evidence of such acts, conduct or declarations would have any practical or material probative force must necessarily be the true guide in determining its admissibility. This is necessarily a question addressed, in the first instance, to the sound discretion of the trial court. Very considerable evidence had been produced, consisting of acts, declarations, and conduct of the defendant on the day of the homicide, and for some time previous, which, in connection with other evidence, was sufficient to require the question of insanity to be submitted to the jury. There was also evidence tending to show that the defendant's condition at the time was the result of a protracted fit of intoxication and drunkenness, caused by the excessive use of intoxicants; and it was claimed that while in this condition, and in a fit of drunken rage, he committed the offense. One of the medical experts testified, in substance, that if his disturbed and excited condition was due to the effects of drinking, or the use of intoxicants, as soon as the effect of the intoxicants would fully pass away he would be restored to his normal condition. No expert testimony was necessary to establish this fact, really within the common experience of the intelligent and discern-

ing. There was evidence to the effect that the defendant's acts, conduct, and declarations had continued to be, in substance, the same as immediately preceding the homicide, until the end of the fourth day. Medicines had been administered to him with a view to restore him to his normal condition, but his condition remained up to this time practically unchanged. Under these circumstances, the ruling that restricted the proof of his acts, conduct and declarations, as bearing upon the question of his sanity, was too strict, and was an unreasonably short limitation. We can not sanction a rule that would arbitrarily limit the reception of such evidence in such cases to what may have occurred within a period of four days after the commission of the offense. The offer was to extend this proof to succeeding days, and to show the continuance of such condition, but the trial court held that the proof would be cumulative; and, for this and other reasons stated, it was rejected. The effect to be given to such evidence is for the jury, and that the facts and circumstances may be such as to detract from its weight or persuasive force is no ground for its rejection. It ordinarily consists of acts, declarations, or conduct occurring at different times, and observed by different persons, but, in its effect, is directed to the question of the defendant's sanity at the time of the homicide. We are not aware of any rule in the law of criminal evidence that would sanction the rejection of such testimony, going to the main issue, on the ground merely that it is cumulative. The limitation was not as to the number of witnesses in respect to some one particular act, fact or declaration, but to proof of successive acts, facts or declarations after the fourth day, which might be shown by different witnesses, and all might tend to establish the defense. The right of the accused to have compulsory process to compel the attendance of witnesses in his behalf would be of little value, if the court might arbitrarily refuse to permit them to testify on the ground that the testimony, although relevant, would be cumulative, thus determining the amount of evidence the accused might produce in his defense. The ruling of the court imposed an unreasonable limitation in point of time, and deprived the defendant of the right to produce relevant evidence that might show that, after a reasonable time had elapsed for his restora-

tion to his normal condition, his mental condition and situation remained unchanged, and that they were not, at the time of the homicide, as claimed by the prosecution, the result of protracted and excessive intoxication, producing a fit of drunken excitement and fury. The defendant was thus deprived of proper means of rebutting this contention.

The case of *Com. v. Pomeroy*, 117 Mass. 143, was relied on as sustaining the ruling of the trial court, but it is widely different, and clearly distinguishable, from the present case. In that case there had been no change of habit, conduct, or manner either before or after the homicide, but the normal condition of the accused, a boy of the age of fourteen years, continued throughout without disturbance or change. "He ate with a hearty appetite, slept soundly and quietly, and, in conversation and manner, evinced no remorse or sense of guilt." And, "in the evidence relied on to show the mental condition of the defendant prior to the homicide, it was not contended that there were any marked indications of insanity, nor that, with the exception of an apparent absence of moral susceptibility, or want of moral sense, there was any relation or correspondence between the evidence preceding and that subsequent to the homicide, which gave the latter any special significance." It is proper to observe that in that case it was said that "if the ruling at the trial had been based solely upon the length of time that had elapsed, there would be ground for an argument, assuming the evidence to have been in other respects competent, that the period of only eight or ten days was too strict a limitation of its admission to be a reasonable exercise of the discretion which rests with the court," and which, as we have seen, is the subject of review. *Com. v. Trefethen*, 157 Mass. 180. It is impossible to lay down any general rule upon the question of remoteness in point of time of such acts, conduct and declarations, which will apply to all cases alike, beyond that already indicated, namely, that the acts, conduct or declarations must be so connected with, or related to, or result from the mental condition of the accused at the time the offense was committed, as to throw light upon or illustrate such condition, and possess some material and practical probative force, and when taken in connection with other evidence in the case, tend to show that the defendant was insane at the time of the homicide. The admissibility of such evidence in each case

must be determined with reference to its own peculiar facts and circumstances, and we think, in view of the evidence, that the inquiry might have been properly extended up to the time the defendant was first imprisoned in the state prison; but facts disclosed by the evidence may show, however, that this may be too long or too brief a limitation. If the defendant's mental condition continued unchanged, and substantially as it was for several days before and for four days after the homicide, this might warrant a still further extension of the period of inquiry. In *Freeman v. People*, 4 Denio, 9, evidence of experts as to the condition of the accused four months after the homicide was held competent as tending to prove that he was insane at the time it was committed. In any event, the period of inquiry should be sufficiently extended to include the subsequent acts, conduct and declarations of the defendant, so far as they relate to, are connected with, or grow out of, or illustrate, or afford material evidence of his mental condition when the homicide was committed.

Although not objected to, one of the medical experts testified, in substance, that "a man suffering from the delirium of delirium tremens has no more control over his actions, in that respect, than a man suffering from delirium produced from any other cause, but still he is sane." It is proper to observe that such evidence should not be received. It is directly opposed to the established rule which affords immunity from the consequences of acts which would otherwise be criminal. "Drunkenness is no excuse, but delirium tremens caused by drunkenness may be an excuse, if it produces such a state of mind as would otherwise relieve the party from responsibility." *Reg. v. Davis*, 14 Cox Cr. Cas. 564; *Terrill v. State*, 74 Wis. 288; and numerous cases cited by Justice Casoday in *Terrill v. State*, *supra*. For the reasons already given the judgment of the circuit court must be reversed, and a new trial granted. The judgment of the circuit court is reversed, and the cause is remanded to that court, with directions to proceed to a new trial of the special issue of insanity, and such other proceedings, if any, as shall be required by law; and, to that end, it is ordered that the state prison, in whose custody the said accused William G. French now is, do deliver him into the custody of the sheriff of the county of

Ashland, who is required to keep him in his custody until discharged therefrom by law.

NOTE.—To what extent drunkenness may excuse or palliate a crime.—In *Golliher v. Com.*, 2 Duvall (Ky.), 163, it is declared that an instruction to the jury that "drunkenness can never be received as a ground to excuse or palliate a crime," was, according to the doctrine recognized by the court in *Smith v. Com.*, 1 Duvall, 224, delusive and erroneous.

Mr. Justice Robertson, speaking for the court, says: "Intoxication may stultify and partially demonize its victim, dethroning reason, rousing volcanic passions and either paralyzing or perverting the will; and, therefore, unless brought on for a malicious purpose, it may be, when disabling, entitled to some influence on the questions of malice and free volition.

When and how far it should have any such influence must depend on its motive, its degree, and its effect on the mind and the passions. This qualified doctrine seems to us to be dictated by policy and humanity, and sanctioned by reason and modern authority, and was, accordingly, adjudged to be law in the case just cited."

After defining murder in the first and second degrees, and malice aforethought, Mr. Chief Justice Comegys, of the Supreme Court of Delaware, in *State v. Davis*, 9 Houst. 407, charging the jury on the effect of alcoholic insanity, said:

"Having disposed of the subject of malice, I will now deliver the mind of the court to you upon the subject of the defense set up for the prisoner that there could have been no malice in fact in this case, because the prisoner was so under the influence of liquor that he was incapable of understanding the nature and consequences of the act he did. We say to you, therefore, generally, that drunkenness is no excuse for crime, whether the subject of it knew what he was doing at the time or not. Why? Because the state of public intoxication alleged to exist here is itself a legal offense and is the act of the party setting up the defense; and it is a rule of law that a party shall not be allowed to take advantage of his own wrong. But where the disease of *mania a potu* has supervened from long-continued intemperance, and a party charged with crime can show that it was committed when under the influence of that disease, he is entitled to be acquitted the same as any other insane man. This is where drunkenness is, in a sense, an excuse for crime—where *mania a potu* has resulted, which is alcoholic insanity. It is not pretended by the prisoner's counsel that he was in any sense a victim of the insanity known as mania from drink when he did the fatal act; but he contends that the prisoner can not be convicted of murder in the first degree if he was too drunk at the time to know what he was about, because, he argues, that one in such condition is incapable of intending or premeditating anything; and as there must be evidence of such premeditation to make murder of the first degree, the prisoner must be acquitted of that charge, as his offense is only that of murder of the second degree. We say to you, gentlemen, that, in order to find him not guilty of murder in the first degree, which involves a condition of mind capable of conceiving a purpose, you must be satisfied, as there was no provocation whatever for the prisoner's conduct, and the weapon used by him was a deadly one, that by reason of drunkenness then existing he was not in a condition to

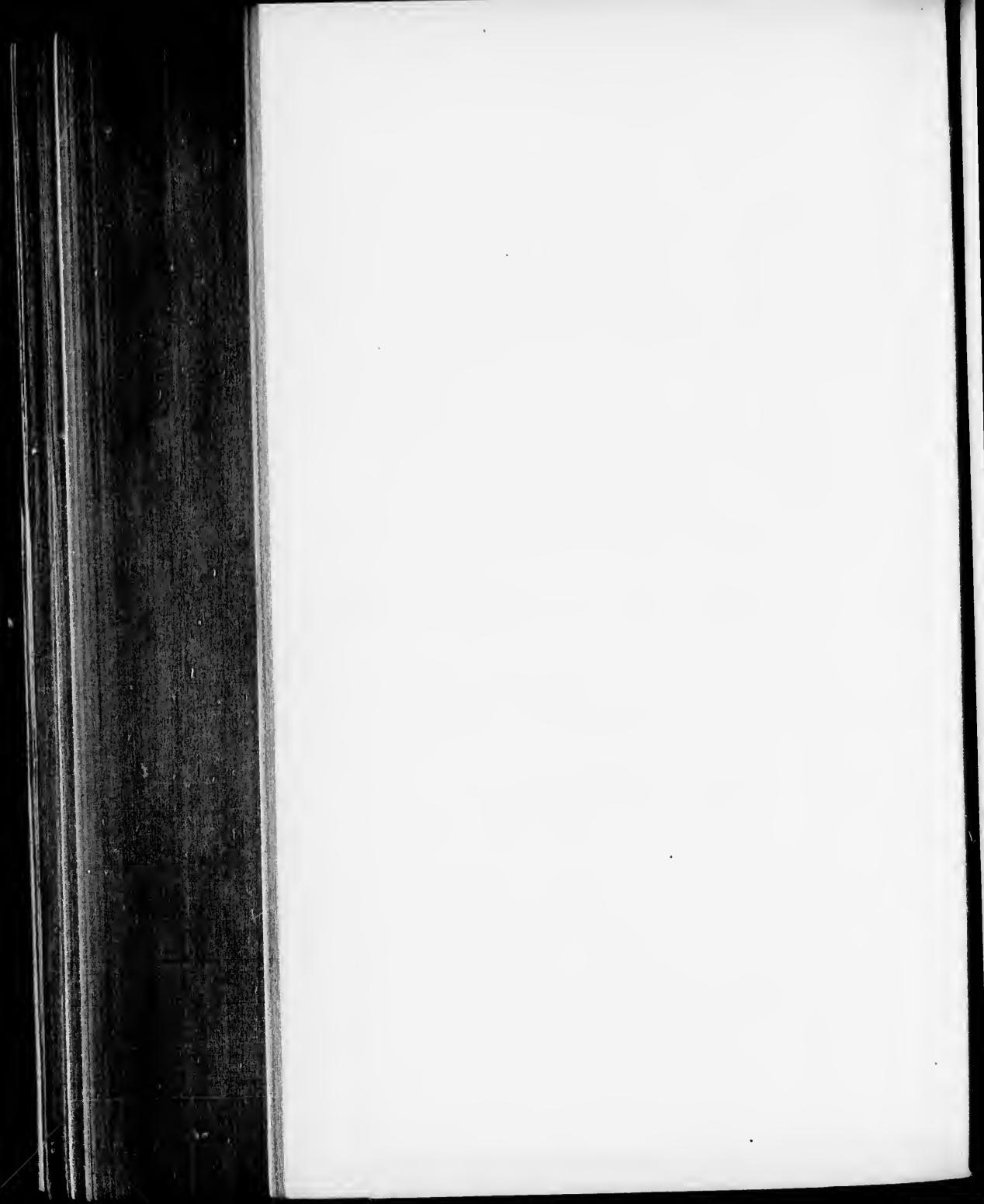
know, and in fact did not know, what he was about when he shot the deceased. The fact that the prisoner was actually drunk at the time, if that is satisfactorily proved to you, will not reduce the offense from murder of the first to murder of the second degree, unless you should be satisfied that he was, from that cause, unable to know what he was about. As the law presumes every one to be sane until the contrary appears, it devolved in this case upon the prisoner to satisfy your minds that when he shot his victim he was too drunk to know what he was doing. Has he done that? If not, he is guilty in manner and form as he stands indicted. If he has done so, then he is guilty of murder of the second degree."

In the Delaware case, *supra*, the facts which, under ordinary circumstances, would constitute murder of the first degree, were practically admitted, and the mental condition of the defendant at the time of the killing was the only question of serious moment in controversy. Little reliance can be placed on text books on this subject, as the author can only give a summary of the decisions, which are in hopeless conflict, depending largely on the view of the judge or court who gives expression to his broad, humane, or illiberal, cruel nature. Some men who can not be sincere or humane at heart, look upon those who indulge their appetites for liquor as outcasts and beyond the pale and protection of the law. This is uncharitable, unchristian, inhuman. The author of life has not endowed all His creatures with the same graces, talents and virtues, nor has He blessed them with the same physical constitution or moral strength; and why should we not acknowledge that there are defectives in the legal sense as in the moral or physical order? If a person has been addicted to the immoderate use of intoxicants, narcotics or the like, to such an extent that it has resulted in mental derangement, why should not that fact be admissible in evidence against a person accused of crime—not perhaps to palliate or excuse the crime, but to mitigate and shorten the duration of punishment therefor? It is needless to say that if a person contemplating the commission of a crime should take liquor or drugs for the purpose of strengthening his design, the condition produced under such circumstances would but add to the enormity of the offense, and this may account for the origin of the rule "that voluntary intoxication is no justification or excuse for crime." The following are among the latest and best considered cases bearing upon the question: *Chatham v. State*, 92 Ala. 47; *Chrisman v. State*, 54 Ark. 283; *People v. Young*, 102 Cal. 411; *State v. Johnson*, 41 Conn. 584; *Garner v. State*, 28 Fla. 113; *McCook v. State*, 91 Ga. 740; *Crosby v. People*, 137 Ill. 325; *Aszman v. State*, 123 Ind. 347; *State v. Donovan*, 61 Iowa, 316; *State v. O'Neil*, 51 Kan. 651; *Buckhannon v. Com.*, 86 Ky. 110; *State v. Coleman*, 27 La. Ann. 651; *Com. v. Gilbert*, 165 Mass. 45; *People v. Garbutt*, 17 Mich. 9; *People v. Wilson*, 55 Mich. 506; *State v. Garvey*, 11 Minn. 154; *State v. Murphy*, 118 Mo. 7; *State v. O'Reilly*, 136 Mo. 597; *O'Grady v. State*, 36 Neb. 320; *Flanigan v. People*, 86 N. Y. 554; *State v. Wilson*, 104 N. C. 808; *Cline v. State*, 43 Ohio St. 332; *Com. v. Cleary*, 148 Pa. St. 29; *State v. Bundy*, 24 S. C. 439; *State v. Morgan*, 40 S. C. 345; *Wileox v. State*, 94 Tenn. 106; *Carter v. State*, 12 Tex. 500; *Evers v. State*, 31 Tex. Cr. Rep. 318; *Ex parte Evers*, 29 Tex. App. 539; *State v. Tatro*, 50 Vt. 483; *State v. Robinson*, 29 W. Va. 713.

Insanity produced by the use of morphine, cocaine and intoxicants.—In the recent case of *Edwards v. The State*, decided by the Court of Criminal

Appeals of Texas, 43 S. W. R. 112, it appeared that the principal defense was that of insanity. The evidence tended to prove that for some time—perhaps several years—the defendant had been addicted to the use of morphine and for the last eighteen months to the use of cocaine; and he was also addicted to the use of whisky. Some three or four days prior to the assault he had been confined to his home under the attention of a physician; had been taking morphine and cocaine, and also drinking whisky. On the same day, prior to the assault, which occurred about four o'clock in the afternoon, defendant had taken four or five doses of cocaine, several doses of morphine and some whisky. Some time in the evening of the 25th of December (the day of the assault) he left his home, going to a saloon—the prosecutor, Tyler, and his brother and another party accompanying him. At the saloon they took a number of drinks, the party drinking about a pint of whisky. The defendant and prosecutor immediately thereafter walked out on the porch in front of the saloon, and the defendant took hold of the gallery post, and immediately, without any warning, stabbed the prosecutor with a knife. There had been no previous grudge between the parties, nor did any quarrel or altercation precede the stabbing. An officer immediately came up and carried the defendant to jail. He asked him what he stabbed the boy for, and he said because he had been after him all morning to go home. (There was no evidence of this fact.) On this state of facts, among other things, the court instructed the jury as follows: "If the defendant, by the voluntary and recent use of cocaine and morphine, or intoxicating liquors, or all of them, put himself in a condition that he was incapable of distinguishing between right and wrong as to the particular act charged against him, and he voluntarily took said cocaine and morphine or intoxicating liquors, knowing that it would produce such state of mind in him, then, although, at the time of the commission of the act, he might not have known what he was doing, or was incapable of distinguishing between right and wrong as to the particular act charged against him, he would not be excusable for the act, if the act was otherwise criminal. If the normal condition of the defendant was that of a sane person, and his mind was not diseased, but was only temporarily dethroned by the recent use of said medicines, or intoxicating liquors, or all of them, and the defendant voluntarily took them, knowing at the time he did so that it would dethrone his mind, then no state of insanity so produced would be a defense to crime. If, however, the defendant, prior to that time, had been affected with disease or bodily suffering, and to cure the disease or allay the suffering he had contracted the use of cocaine and morphine or intoxicating liquors, and that by reason thereof his mind had become, and was at the time of the commission of the act charged against him, diseased to the extent that he had lost control of his mind, and did not know what he was doing, or, if he did know what he was doing, if he did not have mind sufficient to distinguish between right and wrong as to the particular act charged against him, then his condition of mind was such as the law would excuse him for any act done in such state of mind so produced." These charges were excepted to by appellant in the motion for a new trial. It will be seen from these charges, says Mr. Justice Henderson, speaking for the court, that the court made no discrimination between

insanity, whether produced by the voluntary recent use of cocaine and morphine or intoxicating liquors, or if insanity was produced by the combined use of all these. We understand our statute to regulate insanity produced by the recent voluntary use of intoxicating liquors, but it does not undertake to prescribe the rule with reference to insanity produced by cocaine or morphine. And, in our opinion, the court committed an error in instructing the jury that, if they believed appellant was insane from the voluntary recent use of cocaine and morphine, it would constitute no defense to the crime alleged, and would go only to the mitigation of the penalty. In our opinion, if appellant was rendered insane from the voluntary recent use of cocaine and morphine, and on account of that did not understand the nature and quality of the act he was doing, and was incapable of forming the intent, then he would not be guilty of an assault with intent to murder. And we go further, and hold that, if his mind was rendered insane by the combined recent use of cocaine and morphine and intoxicating liquors, and that on such account he was not capable of forming the intent necessary to constitute an assault with intent to murder, he would not be guilty of said offense. We believe it is a correct legal principle, where there is insanity produced by other causes in conjunction with the recent use of intoxicating liquor, that an act done in such a state of mind can not be attributed solely to the recent use of intoxicating liquors. See 1 McClain Cr. Law, § 159: *Roberts v. People*, 19 Mich. 401; *Terrill v. State*, 74 Wis. 278.



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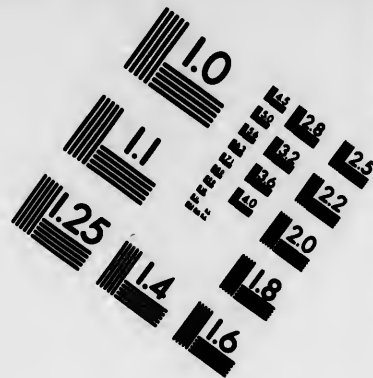
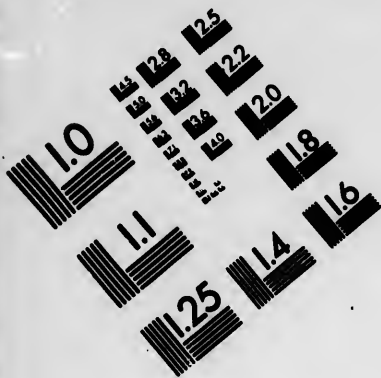
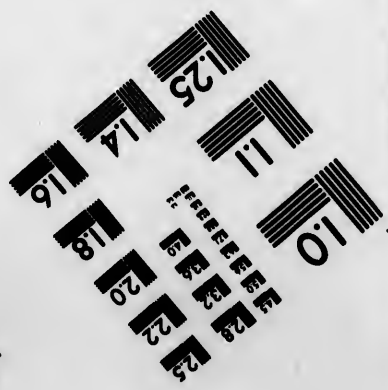
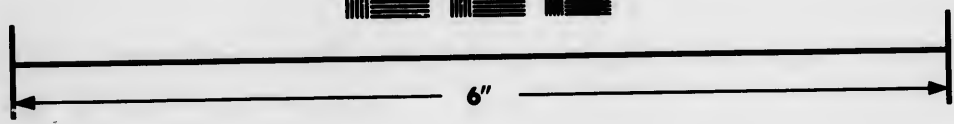
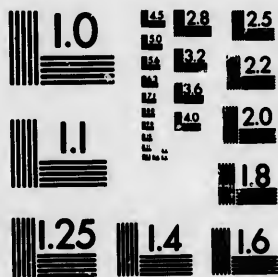


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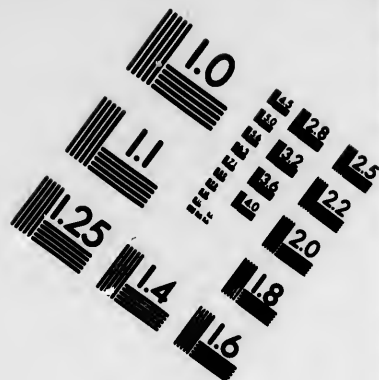
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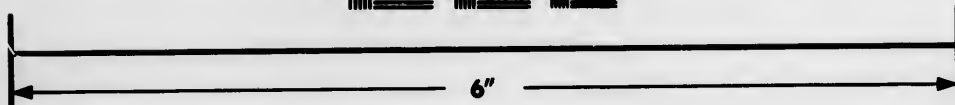
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